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Supreme Court, U.S.
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NO. _____

Supreme Court of the United States

OCTOBER TERM, 1985

BUDGET RENT-A-CAR
OF CINCINNATI, INC. ..... APPELLANT

VS.

REVENUE CABINET, COMMONWEALTH
OF KENTUCKY ..... APPELLEE

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. The "first alternative" method of taxing appellant's Kentucky highway use would impose a material non-tax burden (the registration and licensing of motor vehicles) and a substantial one-time tax burden ($500.00 to $1,000.00 and more per car) on all non-Kentucky citizens who drive across federally-financed highways through Kentucky. The basis of upholding such treatment could be founded only on *Kane* v. *New Jersey*, 242 U.S. 160 (1916) and *Hendrick* v. *Maryland*, 234 U.S. 610 (1915). Two issues arise:

(a) Are *Kane* and *Hendrick* still viable, in view of the changes in American economic and social life since 1916 and the Federal Highway Act?

(b) Do *Kane*, *Hendrick*, and the Commerce Clause of the United States Constitution (i.e., Art. 1, §8, cl. 3) permit so material and substantial a burden to be placed on transient users of Interstate highways?

II. The "second alternative" form of Kentucky highway use taxation, the one actually imposed on the appellant because of an imagined "agreement," is measured by the time appellant's vehicles operate on all highways, and the mileage traversed by them across all highways. Can Kentucky impose and collect such a tax equally upon Kentucky time and mileage and upon non-Kentucky time and mileage?

III. Incidental to the question raised in Issue II, is the further question: Can a state court create and rely on an "agreement" which never occurred in fact, in view of the Fourteenth Amendment Due Process guarantee of the United States Constitution?

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The opinions of the Court of Appeals of Kentucky, the Franklin Circuit Court and the Kentucky Board of Tax Appeals are not reported. They are reprinted in the appendix hereto.

JURISDICTION

This is an appeal from the Supreme Court of Kentucky. The date of the entry of the judgment sought to be reviewed is January 16, 1986. A motion by "amicus petitioners" for leave to file an amicus petition for rehearing and modification was denied by Order of the Supreme Court of Kentucky dated March 12, 1986. The Notice of Appeal was filed on March 20, 1986 with the Supreme Court of Kentucky and the Franklin Circuit Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND RULES

The constitutional provisions and statutes are lengthy. Their pertinent text is set forth in the appendix. Their citations are as follows:

United States Constitution
- Article 1, Section 8, Clause 3
- Fourteenth Amendment, Section 1

Kentucky Revised Statutes (hereinafter "KRS")
- KRS § 138.455
- KRS § 138.460
- KRS § 138.463

KRS § 138.470
KRS § 186.020
KRS § 186.050
KRS § 186.140
KRS § 186.145
KRS § 281.011
KRS § 281.014
KRS § 281.610
KRS § 281.615

Ohio Revised Code (hereinafter "ORC")
ORC § 4503.02
ORC § 4503.04
ORC § 4503.10
ORC § 4503.37

Kentucky Administrative Regulations (hereinafter "KAR")
103 KAR § 44:020

STATEMENT OF THE CASE

Budget Rent-A-Car of Cincinnati, Inc., an Indiana corporation, operates a car leasing business in Cincinnati, Ohio. Three outlets are located in Ohio. A fourth outlet is located across the Ohio River at the Cincinnati Airport in Hebron, Kentucky, 13 miles down Interstate 71/75, across the Interstate bridge. Roughly 86% of the autos rented from the airport location are driven directly from the airport into Ohio, and operate exclusively thereafter on Ohio's highways.

This lawsuit involves a highway usage tax deficiency assessed by the Commonwealth of Kentucky. Budget has already paid to Kentucky a 5% tax on an amount which approximates its customers' use of Kentucky highways. Kentucky seeks to collect a 5% tax on the charges which Budget has been paid for time spent and miles driven on Ohio roads.

Pursuant to statute,[1] and in recognition of the fact that most of Budget's cars are used on Ohio highways, Budget and the Kentucky Department of Transportation [hereinafter DOT] negotiated the number of cars which would be registered and licensed in Kentucky each year. Accordingly, Budget registered approximately 1/5 of its total fleet (19.66% average) in Kentucky. It paid tax on those cars only, resulting in tax payments which approximated road usage.

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[1]Under Kentucky Revised Statutes 281.011 [hereinafter KRS], Budget, as a "U-Drive-It" business, is defined as a "motor carrier." Under KRS 281.615, Budget is required to obtain a motor carrier certificate to operate in Kentucky. Under KRS 281.610, the Kentucky DOT is given the authority to issue a certificate to a motor carrier engaged in interstate commerce, subject to that carrier's compliance with requirements imposed by the DOT.

I. BUDGET NEVER AGREED TO AN ALLOCATION FORMULA PURSUANT TO A REGULATION.

A central factual misstatement in the Kentucky Supreme Court's opinion is contained in its very first paragraph. The Court says:

> Pursuant to the applicable statutes and *regulations* of this state, an allocation formula was devised and *agreed to* by which Budget registered some 19% of the vehicles used at this location in Kentucky, the remainder being registered in Ohio. (Emphasis added).

The regulation cited provides:

> Fleets of vehicles operating under a U-Drive-It permit which are registered pursuant to an allocation formula by the DOT may, upon approval by the Department of Revenue, elect to pay the 5% usage tax on revenue derived from rental or leasing of *all motor vehicles* rented or leased in Kentucky. (Emphasis added)

103 Kentucky Administrative Regulations 44:020(6)(b) [hereinafter KAR].

Throughout the remainder of its opinion, then, the Kentucky Supreme Court correctly characterizes the only "regulation" it cites as one which is "quite simple." 103 KAR 44:020(6)(b) sets out the tax structure imposed upon Budget by the Supreme Court of Kentucky: Budget must pay tax on 100%, not 20% of its cars.

One would have to conclude that Budget "agreed" to be treated under a "quite simple" provision of a "regulation", and promptly violated its agreement with impunity.

Quite simply, the Kentucky Supreme Court misstated the facts.[2]

The Kentucky Board of Tax Appeals correctly stated that Budget "*failed* to apply for a fleet allocation formula pursuant to . . . 103 KAR 44:020." (Emphasis added). The Franklin Circuit Court saw that no such agreement had been made, and noted that Budget was not even authorized under the statutes or the regulations to make such an agreement.[3] The Kentucky Court of Appeals affirmed the Franklin Circuit Court, without the need to address the Kentucky government's untenable argument that Budget should be treated "as if" it had made such an agreement.

II. THE TAX IMPOSED UPON BUDGET IS A USAGE TAX ON THE PRIVILEGE OF USING KENTUCKY HIGHWAYS.

It is central to the issues in this case to understand the nature of the tax involved. On five separate occasions — on

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[2]Repeating verbatim the Kentucky government's briefs, the Kentucky Supreme Court misstated a further fact which is irrelevant, but casts further unfair disparaging light on Budget. That court says that Budget collected "the 5% usage tax on all vehicles," sent only a portion to Kentucky — "pocketing the remainder." That is simply not so. Budget uses a pre-printed national form which has a space for "sales tax or surcharge." In Kentucky and in states where there is no sales *or* usage tax at all, Budget collects the "surcharge."

[3]To qualify, one must own a fleet "registered pursuant to an allocation formula by the Department of Transportation." *See* 103 KAR 44:020(b). The registration statute, upon which the DOT regulation is based, is KRS 186.050. Under this statute, Budget's vehicles are excluded from the definition of a "commercial vehicle." *See* KRS 186.050(1), .050(3)(b). Only "commercial vehicles" may be registered in this manner; and no Budget vehicle qualifies. Secondly, the agreements authorized for proportional registration are "agreements with other jurisdictions" — not with any individual fleet owner. KRS 186.050(14)(a). There is no applicable agreement with Ohio.

pages 1, 3 and 4 of its opinion — the Supreme Court of Kentucky correctly referred to this as a "usage tax." Twice — on pages 5 and 7 of its opinion — the Kentucky Supreme Court correctly referred to the tax as one "on the privilege of using a motor vehicle upon the public highways" of Kentucky. This characterization is mandated by the Kentucky legislature. KRS 138.455. The Kentucky Supreme Court had correctly characterized this same tax in an earlier case.[4]

The Kentucky Supreme Court supported its correct characterization of the tax by noting that the Constitution of Kentucky requires that the proceeds of the tax "be placed in the road fund." Not one nickel of the taxes sought here to be collected are paid for the construction or maintenance of the Greater Cincinnati Airport where Budget does its business in Kentucky. Not a nickel goes into the portion of the Kentucky fund which supports the education of Budget's employees or their children, nor the health and welfare of its officers, servants or customers. Not a nickel goes towards the support of the police or fire functions which protect its business. Every nickel goes into the construction and maintenance of Kentucky highways. It is a highway use tax *par excellence.*

III. THE KENTUCKY MOTOR VEHICLE USAGE TAX SCHEME.

Budget, as a qualifying U-Drive-It, is accorded optional treatment under the motor vehicle usage tax scheme.

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[4]*See George* v. *Scent*, 346 S.W.2d 784 (Ky. 1961) (motor vehicle usage tax is "imposed upon the privilege of *use* of motor vehicles in the state.") (Emphasis in original).

The "first alternative," KRS 138.460, provides:

> "(1) [A] tax levied upon its *retail price* at the rate of 5% shall be paid *on the use in this state* of every motor vehicle . . . ." (Emphases added).

No statutory exemption applies to Budget. These taxes are to be collected *at the time the auto is registered* in Kentucky. *See* KRS 138.460(2).

The "second alternative" is provided in KRS 138.463:

> (1) [A] holder of a certificate as required under KRS 281.615 to operate as a U-Drive-It as defined in KRS 281.014 may pay the usage tax as provided in KRS 138.460 [above] or may pay a usage tax of five percent (5%) levied *upon the amount of the gross rental* or lease charges paid by a customer or lessee renting or leasing a motor vehicle from such holder of a certificate
>
> . . .
>
> (3) In the event the holder of the certificate *elects* to pay the usage tax by the alternate method as provided in subsection 1, he shall present his certificate to the county clerk *at the time the motor vehicle is offered for registration in Kentucky* . . . . (Emphases added).

The lump sum 5% tax on the value of the vehicle (the "first alternative" tax) apparently is payable only upon the registration of that vehicle in Kentucky. The "second alternative" may be elected only at the time of registration of "the vehicle".

Contrary to the apparent statutory language,[5] the Kentucky Supreme Court held that Budget must pay the 5% gross receipts tax on *all* Kentucky *lease transactions*, including those involving cars never registered in Kentucky. The Cabinet has never sought to collect 5% of the value of the unregistered vehicles — the "first alternative" tax. In the Kentucky Supreme Court's view, then, Budget will be treated *as if* it elected to pay the gross receipts tax on those cars and *as if* they had been registered in Kentucky.[6]

IV. BUDGET HAS PAID ITS FAIR SHARE OF THE TAX BURDEN FOR THE PRIVILEGE OF USING MOTOR VEHICLES ON THE HIGHWAYS OF KENTUCKY.

During the years 1976 through 1980, Budget timely submitted Kentucky motor vehicle usage taxes based on 5% of the rental receipts from the airport location of all Kentucky-registered cars. Since registration approximated road usage, so did the tax payment. The Kentucky Revenue Cabinet [herein Cabinet] audited Budget and assessed a deficiency which, with penalties and interest, currently totals nearly $500,000.00. Budget appealed administratively, always raising its constitutional ground.

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[5]During the oral argument before the Kentucky Supreme Court, one of the Justices asked counsel for Budget to cite the portion of the statute which provided that the election to pay the second alternative is made at the time the motor vehicle is registered. Counsel read KRS 138.463(3) — verbatim, without paraphrase or explanation. The Justice said: "It can't mean that."

[6]On page 4 of its opinion, the Kentucky Supreme Court misstates the contentions of Budget in the Kentucky Court of Appeals. It is perfectly obvious that KRS 138.463(1) does not say that Budget elects the "second alternative" tax only on "motor vehicles . . . registered in Kentucky". That limitation appears, not in 138.463(1), but rather in 138.463(3). The latter statute provides that the election may be made only "at the time the motor vehicle is offered for registration."

The Kentucky Board of Tax Appeals upheld the assessment, but did not decide the constitutional issues presented by Budget — on the ground it lacked jurisdiction of constitutional matters. The Franklin Circuit Court found that the Cabinet did not have the authority to collect the claimed deficiency under the statutes and regulations in force at the time. That court found that "appellant has been assessed taxes . . . for the 'use' of motor vehicles 'within the state' while the vast majority of the actual use of those vehicles was, in fact, in other states — to the extent of 86% of 84% of the leases executed in Kentucky." To accept the Cabinet's construction of the taxing scheme, that court determined, would "plainly constitute an undue burden on interstate commerce . . ." Relying on the principle that a legislature is presumed to intend to act within the parameters of the Constitution, that court carved down the statute to constitutional proportion. The Kentucky Court of Appeals affirmed.

On further appeal, the Kentucky Supreme Court upheld the deficiency assessment.

V. THE "SECOND ALTERNATIVE" TAX IS READILY APPORTIONABLE.

The Kentucky Supreme Court asserted a modestly incorrect characterization of the lease transaction as one charged "by the *mile* driven." As will be perfectly obvious to this Court, Budget (and every other company in its business) charges by the mile driven, and by the time the vehicle is used. The nature of a "rent or lease" transaction of any kind requires some such differential rate. With respect to the lease of most real or personal property, the charge is based solely upon the *time* the property is used.

Because of the special nature of an automobile or truck, it is possible to add an element based upon mileage. No "rent or lease" transaction has ever existed where the consideration paid by the lessee to the lessor was based on a "flat" charge unapportioned to the time or amount of use.[7] The tax now before this Court, then, is one to which the notion of "apportionment" is crisply applicable. For all the difficulties which legislatures and courts encounter "apportioning" other sorts of taxes, this is one where no difficulties arise. The incidence of the tax itself stretches out — mile after mile, hour after hour.

THE QUESTIONS ARE SUBSTANTIAL

I. STATES' RIGHTS TO LICENSE AND TAX THE USE OF INTERSTATE HIGHWAYS SHOULD BE BROUGHT INTO THE SECOND HALF OF THE TWENTIETH CENTURY.

Budget had the "choice" of complying with a wildly exorbitant KRS 138.460, or the second alternative scheme under 138.463. As construed by the lower Kentucky courts, the second alternative would have exacted a constitutional tax. In contrast, KRS 138.460 is unconstitu-

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[7] The Kentucky Supreme Court's reference to the Kentucky tax as "a flat percentage charge" does not change the incidence of the tax. It is true, of course, the 5% is "flat." But the concept of a "percentage" requires that the charge be applied to another figure — a percentage of something. Although not mentioned by the Kentucky Supreme Court, the value of the vehicle also is a component of the rent or lease charge. That is, a Cadillac's time and mileage rate will be higher than a Volkswagen's. The tax receipts under the "second alternative" will rise or fall in any case in direct proportion to the number of *miles* upon which the vehicle travelled upon highways and the *time* in which highways were used.

tional on its face.[8] It provides: "The tax levied upon its retail price at the rate of 5% shall be paid on the use in this state of every motor vehicle." This statute could be sustained only under the rationale of this Court's classic decisions in *Hendrick* v. *Maryland*, 235 U.S. 610 (1915) and *Kane* v. *New Jersey*, 242 U.S. 160 (1916). In the immediate post-horse-and-buggy years, the states were given the authority to exact fees from non-residents and to impose registration requirements, when motorized carriages were driven into the state.[9]

Mr. Justice Brandeis' analysis in *Kane* constituted a wise and balanced view of federal-state relations in a vanished period of American history. In the mid-1950's, the federal and state governments recognized and accelerated radical social and economic changes in the function of their highway system. The time has come to reexamine *Kane* in view of those changes. The notion that a state can license and significantly tax a foreign resident for mere passage through its state has become bizarre. *Kane* involved a New Jersey law enacted when less than 200,000 automobiles existed in the entire country. There were 162,000,000 motor vehicles as of 1983.[10]

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[8]Budget tried to avoid the pernicious effect of the "first alternative" tax by *electing* to pay the "second alternative" tax on the cars it registered. The Kentucky Supreme Court's decision now requires Budget to have recourse to a "choice" between two unconstitutional taxes. *See* argument pages 19-20 *infra*.

[9]Kentucky requires registration of all cars which operate on Kentucky highways under KRS 186.020. Out-of-state residents are caught by this registration requirement unless registered in a state which grants an exemption to nonresidents. KRS 186.140. *See also* KRS 186.145. Ohio has no exemption for Kentucky residents. *See* footnotes 15 and 19 *infra*.

[10]*Compare*, U.S. Department of Commerce, Bureau of the Census, *Bicentennial Edition of Historical Statistics of the United States, Colonial Times to 1970, Part 2*, p. 597 (1975) *with* U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1985*, at p. 716 (105th ed. 1984).

The burden of stopping every car at every state's border to register and collect a tax would be overwhelming: so Kentucky does not try to enforce its laws, except as to Budget and other bureaucratically selected non-residents. The Kentucky Attorney General has concluded that such a random practice is proper.[11]

The wisdom of preserving *Kane* and *Hendrick* in their outlandish new context is now eroded. In both decisions, this Court was faced with the state's concern with regulating "dangerous instrumentalities". The New Jersey law in *Kane* was a means to require the non-resident to appoint an agent in the state for purposes of service of process and reasons of public safety.[12] A plethora of modern regulations — not the least of which are long-arm statutes — moot the underlying rationale.

Also underpinning the Court's rulings was the view espoused in *Hendrick:*

> [W]here a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor.

235 U.S. at 624. How times have changed! The entire local-federal relationship has shifted dramatically. The Federal-Aid Highway Act, 23 U.S.C. §101, *et seq.* has substantially

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[11] Kentucky Attorney General Opinion 82-460.

[12] Kentucky's equally ancient registration laws require registration of all vehicles at the border, subject to no real exemptions. *See* note 14 *infra.*

and properly eliminated the state's financial burden[13] of constructing and maintaining highways under the Federal Aid system. Budget's Kentucky road usage, for example, almost exclusively involves the use of a small segment of an Interstate highway in Kentucky and the Interstate bridge. Budget and its fellow non-Kentucky taxpayers already pay 90% of their cost.

This is a particularly useful case in which to raise and settle this issue, since the burden placed by Kentucky on transitory use is so massive that it would not have satisfied Mr. Justice Brandeis even in 1916. Charging the transient non-resident a tax of 5% on the value of a vehicle is absurd. Under KRS 138.460, an Ohio attorney who drives across the Interstate Bridge to make a court appearance in Covington, Kentucky, is subject to (aside from registering his car) a tax equal to 5% of the value of his vehicle. If he drives an auto worth $10,000.00, he would be assessed a tax of $500.00. A Michigan vacationer driving his van valued at $20,000.00 down Interstate 75 to Florida has a liability of $1,000.00 — perhaps at each state border he crosses. How is that possible? In Kentucky at least

[13] Many of this Court's prior decisions in highway usage tax cases rested on the assumption that "the state builds the highways and owns them." *See, e.g. Aero Mayflower Transit Co.* v. *Bd. of R.R. Comm'rs*, 332 U.S. 495, 503 (1947).

there is no tax exemption for non-residents.[14] Nor are transients exempt from registration.[15]

II. THE DIRECT TAXATION BY A STATE OF THE USE OF ANOTHER STATE'S HIGHWAYS SHOULD BE PREVENTED, AND *BRADY* CLARIFIED.

The constitutional problem of this tax might have been solved by the legislature – by its adoption of a registration requirement as the key to taxation, together with a reasonable and constitutional limitation on the registration requirement. The DOT and Budget worked together and came up with a number of vehicle registrations which

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[14] KRS §138.470 covers exemptions. The Cabinet tried to avoid the obvious illegality of the tax statute by arguing that a vehicle owner who has paid a sales tax or usage tax in another state will get *credit* in Kentucky under KRS 138.460(5) for the tax paid and that therefore "as a general rule, vehicle owners are *exempt* . . . ." In reality, "as a general rule," all vehicles are taxable. (A) The credit applies only to *residents* who bring in a car that was previously registered in another state. A less onerous scheme was held violative of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution by this Court in *Williams* v. *Vermont*, 105 S.Ct. 2465 (1985) (unequal tax credit treatment based on residency). The Cabinet had argued unsuccessfully below that Budget was a Kentucky resident by virtue of doing some of its business in Kentucky. Budget is an Indiana corporation whose principal place of business is in Ohio. The Tax Board rejected Budget's unsupported allegation in light of contrary authority. *See Bd. of Educ.* v. *Ashland Oil & Refining Co.*, 350 S.W.2d 475 (Ky. 1961); *American Barge Line Co.* v. *Bd. of Supervisors*, 246 Ky. 573, 55 S.W.2d 416 (1932); *Covington* v. *Standard Oil Co.*, 137 Ky. 837, 127 S.W. 480 (1910); *Ayer & Lord Tie Co.* v. *Keown*, 122 Ky. 580, 93 S.W. 588 (1906). (B) If the foreign state does not grant credit on a *reciprocal basis*, no credit is allowed in Kentucky. Thus, even a resident who operates a car on Kentucky highways that was previously registered in most other states, receives no credit. Ohio Revised Code [hereinafter ORC] § 4503.37. (C) Even if Kentucky granted the non-resident a credit, a burden is not eliminated. For example, if an Ohio vacationer paid a prior 3% tax on his $20,000 van, he still owes Kentucky $400 when he arrives at the border.

[15] For example, KRS 186.140 requires absolute reciprocity, while ORC § 4503.37 contains conditions not met by Kentucky. *See* note 19 *infra*.

actually produced tax for Kentucky in an amount equal to roughly 5% of the use by Budget's customers of Kentucky highways.

The Kentucky Supreme Court, however, believed that *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977) dispensed with the requirement that a court examine the nature and incidence of the tax. The Kentucky court said that Kentucky may constitutionally exact (and has exacted) an unapportioned tax for the privilege of using Kentucky highways on all cars leased from the airport, including those registered in Ohio, in the face of uncontroverted evidence establishing the overwhelming use of those cars on out-of-state highways. Such a confusion in the application of *Brady* must be corrected by this Court.

Although the facts of *Brady* are inapposite to our case, this Court established in *Brady* four factors[16] which must be applied to determine if a tax is constitutional. The state tax must (1) be applied to an activity with a substantial nexus with the taxing state;[17] (2) be fairly apportioned;

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[16]The Kentucky tax meets none of the four. We focus here on one. *See also*, notes 17-19 *infra*. The Fourteenth Amendment of the U.S. Constitution is also involved.

[17]The Kentucky Supreme Court's opinion and the regulation provide the nexus requirement. The statute itself requires no nexus. Under the statute, a certificate holder is taxed on lease transactions regardless of where they occur.

(3) not be discriminatory;[18] and (4) be fairly related to services provided by the state. Unlike *Brady*, we do not challenge the tax merely because it directly taxes "the privilege of engaging in interstate commerce." We do not urge (nor have we ever urged) application of a *per se* rule. In *Brady*, the "activity" taxed was "commercial transactions," not road use. *Brady* was "applied only to commercial transactions in which . . . payment [was] made for transportation from one point within the state to another point within the state." The activity taxed — commercial transactions — was fairly apportioned.[19]

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[18]The 5% gross receipts tax applies to both Kentucky corporations and Budget, a non-resident. The "practical effect" of the tax however, demonstrates that Budget is taxed at a highly disproportionate rate. "[A] State 'may not discriminate between transactions on the basis of some interstate element.' " *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984). Under this court's analysis in *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64 (1963), the practical operation of the tax discriminates in favor of local interest. *See id.* at 69. As this Court found in another context, equally applicable here, "the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application as between those two classes of commerce . . . impossible.' " *Id.* (quoting *Nippert* v. *Richmond*, 327 U.S. 416, 432 (1945)).

[19]Incidental to this Court's requirement of fair apportionment is the underlying concern of multiple taxation. The Kentucky Supreme Court dismissed any question of double taxation since there was no proof Ohio actually charged a highway usage tax on Budget's cars. As this court has recently reiterated, whether actual multiple taxation exists "is not the test." *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984). A *risk* of multiple taxation is sufficient. Due to habitual and regular Ohio highway usage, Ohio could constitutionally levy a tax on that activity. Moreover, the existing Ohio tax scheme would permit Ohio to exact road usage compensation. Under ORC 4503.10(A), every motor vehicle "which is operated or driven upon the public roads or highways" is subject to annual registration with appropriate fees. Since the Ohio-registered cars rented from Budget in Kentucky are assessed Kentucky taxes unrelated to fuel consumption or Kentucky highway usage, no exemption is available to Kentucky. *See* 4503.02, .04, and .37.

The Kentucky Supreme Court has confused *Brady* to say that all taxes may be treated as "transaction" taxes. It is critical to all states that this Court update the treatment of highway usage laws after *Brady*.

In the Kentucky Supreme Court's view, the fact that *leasing transaction* occurred within Kentucky, and the fact that some portion of a lessee's trip would entail travel on a Kentucky highway, were sufficient to satisfy the fair apportionment standard of *Brady*. While these facts may establish the requisite "nexus," they do not provide a "total answer" to the requirement of fair apportionment.

The fact that Budget uses a portion of Kentucky roads on any given trip should not, standing alone, sustain every sort of tax. *See Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 186 (1931). This Court has recently "rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from . . . scrutiny [merely] because it attaches only to a 'local' or intrastate activity." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981).

Numerous decisions of this Court demonstrate that the "fair apportionment" requirement involves a two-step analysis. This Court identifies the activity on which the tax is based. *Then* the Court scrutinizes the practical effect of the tax to see if the state effectively apportions the tax *to reflect that activity.*[20]

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[20]*See e.g. Canton R.R. Co.* v. *Rogan*, 340 U.S. 511, 515-16 (1951) ("where transportation is concerned, an apportionment according to the mileage within the state is an approved method.") and *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653 (1948) (tax on transportation receipts constitutional where apportioned to mileage within state). *See also Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979) (California's property tax on containers used in interstate commerce apportioned to reflect containers' "average presence" in state); *Revenue Dept.* v. *Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734 (1978)

(continued on page 16)

The Kentucky Supreme Court correctly focused on precisely what activity is being taxed — Kentucky highway usage — but then applied a test for apportionment *as if* it were a tax based on "business in this state." Apparently ignoring *Brady's* requirement that the tax be apportioned to the activity taxed, the Kentucky Supreme Court noted only that the mileage[21] part of the rental formula is ultimately dependent on the lessee. *Of course* the user's activity determines the tax. That is precisely the point: the user's taxable "activities" are what must be apportioned!

(footnote 20, continued from page 15)

(Washington State business and occupation tax on stevedoring services measured by value of services performed within state is fairly apportioned. In *Washington*, it is noteworthy that the tax statute at issue exempted all income derived from actual transportation of persons or property across state lines); *Standard Pressed Steel Co.* v. *Dept. of Revenue*, 419 U.S. 560, 564 (1975) (tax upheld as "apportioned exactly to activities taxed."); and *Braniff Airways, Inc.* v. *Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590 (1954) (ad valorem tax on airlines subject to apportionment among states aircraft habitually used). Compare *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954) (tax on production of natural gas measured by unapportioned levy on volume of gas to be shipped out of state unconstitutional because unrelated to state's portion of pipeline).

[21]We do not argue (and have never argued) that mileage is the only constitutionally permissible means upon which a highway usage tax may be fairly apportioned. Nor did the Kentucky Court of Appeals so argue — the Kentucky Supreme Court's statements notwithstanding. This Court has upheld taxes imposed by states as compensation for wear and tear on its highways in several forms. *See* e.g., *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950) (value of vehicle plus mileage); *Dixie Ohio Express Co.* v. *State Revenue Comm'n*, 306 U.S. 72 (1939) (weight and capacity of trailers); *Hicklin* v. *Coney*, 290 U.S. 169 (1933) (carrying capacity); *Continental Baking Co.* v. *Woodring*, 286 U.S. 352 (1932) (gross ton mileage); *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245 (1928) (mileage within state); and *Hendrick* v. *Maryland*, 235 U.S. 610 (1915) (horse power).

The distinction between user taxes and the business privilege tax challenged in *Brady* arguably removes this case from direct application of *Brady* and its progeny. As one commentator has noted, highway taxes are peculiar in that they represent a type of rental charge imposed on the user of state provided facilities, and thus are not analogous to the types of taxes heretofore examined under *Brady*. *See P. Hartman, Federal Limitations on State and Local Taxation*, §12.1 at 665-66 (1981). *See also Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 621-22 (1981) ("[I]mposition [of highway usage tax] although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Id.* at 622 n. 12 (quoting *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 190 (1931))). Inarguably, the Kentucky tax falls within that category. The legislature's declared policy embodies the principle that those who use the road shall pay for them. Moreover, the fact that proceeds are used for the highway fund is significant to show the tax was laid for such purpose. *See Morf* v. *Bingaman*, 298 U.S. 407, 412 (1936). As the Kentucky Supreme Court stated in its opinion below: "Under our constitution, the revenues from the [motor vehicle usage taxes] are mandated to be placed in the road fund."

This Court's older highway use tax cases are entirely consistent with the "practical effect" rationale of *Brady*. In those earlier cases this Court avoided any *per se* approach and looked at the practical effect of a tax levied for highway usage. The Kentucky Supreme Court treated *Brady* as if it overruled that entire body of law. A tax levied for the use of the highways would always be upheld

if it had a fair relationship to the use for which the charge is made.[22]

In *Lindsey, supra*, this Court held that such a tax could be sustained only if the tax compensated for road use. Consistent with this Court's later decision in *Brady*, the *Lindsey* Court looked at the practical effect of the tax and rejected the avowed purpose of the tax since it was actually measured by the earning capacity of the vehicle:

> Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate buses.

Id. at 190.

The Kentucky Supreme Court cited *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950) for the proposition that the Kentucky tax need not constitutionally be apportioned to mileage. Central to *Capitol Greyhound Lines*, however, was this Court's observation that the total charge as assessed by Maryland did in fact vary according to miles traveled. Justice Frankfurter's dissent in that case is worthy of re-examination in 1986; but irrespective of that, the *Capitol Greyhound Lines* Court clearly indicated that a road usage tax measured by a flat percentage would not be free from constitutional scrutiny. In this case, Budget established in the courts below that the tax

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[22] *See Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972) (although this case concerns the validity of an airport user fee, the court found its highway usage tax cases "instructive"). *See also Dixie Ohio Express Co.* v. *State Revenue Comm'n*, 306 U.S. 72 (1939); *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183 (1931); and *Sprout* v. *South Bend*, 277 U.S. 163 (1928).

assessed bore *no* relation to compensation for use of Kentucky roads. For every mile driven on an Ohio highway, Budget pays the same fixed amount into the Kentucky Road Fund. And the miles driven in Kentucky are typically driven on an Interstate highway. Both the majority and minority of *Capitol Greyhound Lines* would be shocked.

III. ELEMENTARY FAIRNESS REQUIRES THAT NO JUDICIAL DECISION BE BASED ON A COURT-CREATED "FACT"

The Kentucky Supreme Court's opinion noted the "choice" given to qualifying U-Drive-Its. "Choice" implies a voluntary selection — an exercise of free-will or consent.

The Kentucky court imposed taxes on Budget for all Kentucky leasing transactions as if Budget had gone to a County Clerk's Office and "elected" to register, and to pay the usage tax on "the vehicle" being registered. To reach that result, the court relied on Budget's "agreement" under 103 KAR 44.020(6)(b). Budget was *not* operating under such a proportional fleet allocation formula, as both the Kentucky Board of Tax Appeals and the Franklin Circuit Court found. Budget's registration allotment was an informal agreement with the DOT — altered from time to time on an ad hoc basis, under no regulation whatever. Under the applicable statutes, Budget was not even eligible for the regulation procedure.

Had Budget agreed to pay the gross receipts tax on all cars rented in Kentucky, the state would not be absolved from exceeding its constitutional limits. Faced with the alternative of a $1,000.00 tax on each vehicle's first trip to Kentucky, a business might elect almost anything — but would certainly elect an apparently fair tax treatment. But coerced election according to interest is no election at all. *See Abie State Bank* v. *Bryan*, 282 U.S. 765, 776 (1931)

(The fact the choice was made according to interest does not exclude duress).

A non-existent "choice" is surely even worse than a coerced choice. While issues of "consent" are most often raised for the benefit of alleged criminals, they ought to also be available to admittedly law-abiding citizens. This Court will not allow a court to "presume acquiescence in loss of fundamental rights." *Ohio Bell Telephone Co.* v. *Public Util. Comm'n*, 301 U.S. 292, 307 (1937). Nor is this Court bound by the Kentucky court's blatant factual misstatement. A state court may not impose tax liability so arbitrarily. It is well established that this Court has a duty "to decide for itself facts . . . upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954). Ironically, the Kentucky Supreme Court once found that "the applicability of a tax is not a matter of administrative manipulation." *Commonwealth* v. *Lee's Ford Dock, Inc.*, 551 S.W.2d 236, 238 (Ky. 1977). Nor is it a matter of judicial manipulation. *See Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 680 (1930).

The Kentucky court was not engaging in fact finding or statutory construction; it actually created the fact on which to rest its decision.[23] That court created the "fact" of an agreement — because no alternative argumentation was possible. It has denied Budget the right to a judicial determination based on the uncontroverted facts. If the Kentucky Supreme Court's judgment is sustained, Budget will

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[23]The Kentucky Supreme Court offered no reasoning based upon a "deemed" or "implied" election. Nor could such reasoning be sustained Had Budget's first election been "deemed" to affect more than one car, its next refusal to elect would be "deemed" to revoke the election. Had the Kentucky court implied a waiver of Budget's right to elect, Budget would be entitled to this Court's review of that finding. *Union Pacific R.R. Co.* v. *Public Serv. Comm'n*, 248 U.S. 67 (1918).

be deprived of its property without any meaningful opportunity to challenge the exaction. Where, as here, the Court's error is "so gross as to be impossible in a rational administration of justice," due process has been denied. *See Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25, 30 (1917).

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APPENDIX

OPINION OF THE SUPREME COURT OF KENTUCKY (DELIVERED UPON THE RENDERING OF THE JUDGMENT OR DECREE BY THE COURT WHOSE DECISION IS SOUGHT TO BE REVIEWED)

RENDERED: January 16, 1986
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
No. 84-SC-991-DG

REVENUE CABINET, COMMONWEALTH OF KENTUCKY — MOVANT

ON REVIEW FROM THE COURT OF APPEALS
V. No. 84-CA-707-MR
(Franklin Circuit Court No. 82-CI-1017)

BUDGET RENT-A-CAR OF CINCINNATI, INC. — RESPONDENT

OPINION OF THE COURT BY JUSTICE GANT

REVERSING AND REMANDING

Budget Rent-A-Car of Cincinnati, Inc., among its operations, maintains an automobile rental outlet at Greater Cincinnati Airport, which is located in Boone County, Kentucky. Rentals at that site comprise some 60% of the total business of the corporation. Pursuant to the applicable statutes and regulations of this state, an allocation formula was devised and agreed to

by which Budget registered some 19% of the vehicles used at this location in Kentucky, the remainder being registered in Ohio. This action concerns the usage tax payable to the Commonwealth under the applicable law of the state.

The statute pertaining to the question is:

> **KRS 138.463. Collection of tax on U-Drive-It.**—(1) A holder of a certificate as required under KRS 281.615 to operate as a U-Drive-It as defined in KRS 281.014 may pay the usage tax as provided in KRS 138.460 or, subject to the provisions of subsection (2), may pay a usage tax of five per cent (5%) levied upon the amount of the gross rental or lease charges paid by a customer or lessee renting or leasing a motor vehicle from such holder of the certificate.
>
> (2) A holder of a certificate shall pay the usage tax as provided in KRS 138.460 unless he shows to the satisfaction of the Cabinet that he is regularly engaged in the renting or leasing of motor vehicles to retail customers as part of an established business. Persons first engaging in the renting or leasing of motor vehicles to retail customers shall, in addition to obtaining a certificate required under KRS 281.615, demonstrate to the satisfaction of the Cabinet that they are prepared to qualify under the standards set forth in this subsection.
>
> (3) In the event the holder of such certificate qualifies under subsection (2) and elects to pay the usage tax by the alternate method as provided in subsection (1), he shall present his cer-

> tificate to the county clerk at the time the motor vehicle is offered for registration in Kentucky and the following provisions shall be applicable.
>
> (4) The tax shall be the direct obligation of the holder of the certificate but it may be charged to and collected from the customer in addition to the rental or lease charges. The tax due shall be remitted to the Revenue Cabinet.

The applicable regulation in this case is 103 KAR 44:020(6)(b):

> Fleets of vehicles operating under a U-Drive-It permit which are registered pursuant to an allocation formula by the Department of Transportation may, upon approval of the Department of Revenue, elect to pay the five per cent (5%) usage tax on revenue derived from rental or leasing of all vehicles rented or leased in Kentucky.

Under KRS 138.463(1), Budget chose to operate under this second option, which provides a usage tax of 5% upon "gross rental or lease charges paid by a customer or lessee," rather than paying the usage tax on the vehicles registered in Kentucky. However, they paid this optional tax only on the rental or lease charges on those vehicles registered in Kentucky, and not on the rental or lease charges for the entire fleet of U-Drive-Its rented at the Kentucky location. Relying upon the above quoted regulation and statute, and after a complete audit of Budget, Revenue assessed a

deficiency of $255,526, plus penalties and interest, contending the regulation and the statute clearly required under the option selected by Budget that the 5% usage tax applied to all Kentucky rentals, not merely to rentals of those vehicles registered in the state.

The audit conducted by Revenue on the records of Budget disclosed that Budget had collected the 5% usage tax on all vehicles in the rental fleet, irrespective of its registration, applying the tax to the "time and mileage" charge and the collision insurance charge, but not to other charges such as the "drop-off" charge in the rental contracts. However, Budget had paid the tax thus collected on only the vehicles registered in Kentucky, pocketing the remainder.

The Board of Tax Appeals upheld the deficiency assessment, plus penalty and interest, but its Opinion and Order, written by Edward F. Prichard, Jr., Chairman, was reversed by the Franklin Circuit Court and that reversal was upheld by the Court of Appeals.

STATUTORY CONSTRUCTION

KRS 138.463 provides two alternate methods of paying taxes for U-Drive-It businesses operating in Kentucky. They may pay the usage tax of 5% provided under KRS 138.460 on the value of registered vehicles at the time of registration; or, they may pay a usage tax of 5% on the "gross rental or lease charges

paid by a customer or lessee renting or leasing *a* motor vehicle . . ." There is no language of limitation if the company elects to pay its tax under the second alternative and yet the interpretation urged upon us and adopted by Budget (and by the Court of Appeals) would add to the second alternative, after the words "motor vehicle," the phrase "Registered in Kentucky." We cannot concur with such equivocation, and find no connection in the statute between the two alternatives which would make the first alternative an incidence of the second. *Cf. Furste* v. *Dixie Traction Company*, 286 Ky. 336, 150 S.W.2d 913 (1941).

The alternative methods are quite simple. Once the allocation formula is determined, as provided by 103 KAR 44:020, the U-Drive-It operator may pay the usage tax provided by KRS 138.460 at the time of registration, on all vehicles registered in Kentucky, and exclude those vehicles registered in another state; or they may elect to pay the 5% usage tax derived from leases entered into in this state on *all* vehicles in the rental fleet which are leased in Kentucky.

To hold otherwise would permit Budget to select the best of both alternatives. For example, the record divulges that there was annually a vast difference between the percentage of vehicles registered in Kentucky and the percentage of rental of those vehicles when compared to the entire fleet rental. Also, for two periods, one of four months and one of

five months, no tax was paid at all inasmuch as no Kentucky vehicle was rented out of the entire fleet. Clearly, the statute was not intended to permit Budget, or similar enterprises, to do business in this state on a regular basis without paying a fair and proper tax for that privilege. *Cf. Reeves* v. *Deisenroth*, 288 Ky. 724, 157 S.W.2d 331 (1941). Further, KRS 138.455 states that all taxes imposed under the applicable sections of the chapter are taxes "on the privilege of using a motor vehicle upon the public highways" of this state. Under our Constitution, the revenues from such taxes are mandated to be placed in the road fund.

CONSTITUTIONALITY

The principal thrust of Budget's argument herein is that the regulatory scheme enacted by Revenue under the statute and under the applicable regulations are violative of the United States Constitution, art. 1, § 8, CL. 3, the interstate commerce clause. Budget's contention was adopted by the Franklin Circuit Court and the Court of Appeals, but we do not agree. Although the law relating to the commerce clause has undergone cyclical changes over the past 50 years, one phrase has been repeatedly echoed in the halls of the Supreme Court of the United States. That phrase is: "It is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Western Live*

Stock v. *Bureau of Revenue*, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823 (1938).

The criteria which are to be applied to any state tax relating to interstate commerce, by whatever name such tax pay be levied, were set out in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Those are: (1) There shall not be discrimination between foreign and state corporations; (2) There must be local activities within the taxing state to form sufficient nexus to justify the tax; (3) The tax must be properly apportioned to local activities; and (4) The tax must be related fairly to services provided by the state. Also, this case goes on to say, such tax would be upheld even though the activity was generated exclusively by interstate sales.

Applying these criteria to the case before us, we find distinct compliance with each of them. First, there is no discrimination between this Ohio corporation and any Kentucky corporation operating in the same line of business. In fact, no discrimination is even urged by the respondent. Second, the entire activities of Budget in renting its fleet at its airport location in Kentucky are intrastate, not interstate, giving more than sufficient connection, or nexus, to this state in the operation. The fact that the customer, or lessee, may go north, south, east or west from his point of Kentucky origin is his choice, not that of Budget. Also, in whichever direction he goes, he operates upon the highways of this state for some por-

tion of the trip. This is a total answer to the third standard. The apportionment by mileage urged by Budget is not required under the commerce clause, especially where there is this volume of local activities. *See Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053 (1950). Finally, the tax is on the privilege to use the highways in this state, not on the use itself. Although Budget may charge by the *mile* driven, the tax is a flat percentage charge for the *privilege*.

Of course, as Budget readily admits, there is no question of double taxation herein as Ohio charges no registration tax or usage tax on any of the Ohio charges no registration tax or usage tax on any of the Ohio licensed vehicles in the fleet.

STATUTORY APPLICATION

We further affirm the Board of Tax Appeals in its opinion that the tax applies to *all* charges, including "total time and mileage," "full collision insurance," "personal accident insurance," and "drop-off charges," as set out in the lease agreement with Budget as lessor and the customer as lessee. We find no ambiguity in a statute which assesses the usage tax upon "gross rental" and "gross . . . lease charges." As any dictionary definition reads, "gross" means "without deductions." If it is a charge contained in the lease, by clear meaning that is a "lease charge."

We reverse the Court of Appeals on the issues herein disposed of and remand this case to the Franklin Circuit Court for further proceedings dealing with penalty assessment, statute of limitations, and all other issues originally raised but not disposed of in that court.

All concur.

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OPINION OF THE KENTUCKY COURT OF APPEALS (RENDERED IN THE CASE)

OPINION RENDERED:
October 12, 1984; 3:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 84-CA-707-MR

REVENUE CABINET, COMMONWEALTH OF KENTUCKY — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE HENRY MEIGS, JUDGE
ACTION NO. 82-CI-1017

BUDGET RENT A CAR OF CINCINNATI, INC. — APPELLEE

AFFIRMING

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BEFORE: COMBS, DUNN and WHITE, Judges.

WHITE, JUDGE. This appeal is from a judgment of the Franklin Circuit Court by which a tax liability assessed by the Revenue Cabinet and affirmed by the Board of Tax Appeals was reversed.

Budget Rent A Car operates a car leasing agency at the Greater Cincinnati Airport in Hebron, Ken-

tucky. At issue is the amount of the usage tax owing under KRS 138.463 from this business. That statute states:

> (1) A holder of a certificate as required under KRS 281.615 to operate as a U-Drive-It as defined in KRS 281.014 may pay the usage tax as provided in KRS 138.460 or, subject to the provisions of subsection (2), may pay a usage tax of five percent (5%) levied upon the amount of the gross rental or lease charges paid by a customer or lessee renting or leasing a motor vehicle from such holder of the certificate.

Through a previous arrangement with the Department of Transportation, Budget had agreed to register approximately one-fifth of its Airport fleet in Kentucky, with the balance's bearing Ohio tags. However, it levied the 5% tax against all rentals, reporting to Kentucky only that portion relating to the leasing of a Kentucky-licensed vehicle and retaining as profit that attributable to Ohio cars. In response thereto the Revenue Cabinet assessed a deficiency of $255,526.00, asserting that the tax is chargeable against the value of all vehicles used in Kentucky, not just those registered herein.

Reviewing the Board of Tax Appeals' holding that such tax was due, the Franklin Circuit Court reversed, finding that to permit a tax against the entire fleet when approximately 72% of the leases involved actual use of the vehicles in other states (once

leased, the cars frequently were driven out of Kentucky) would be an undue burden on interstate commerce, an unconstitutional act not presupposed by the Legislature in its drafting.

An examination of KRS 138.463(1) indicates that a holder of a U-Drive-It certificate has an optional method of complying with the usage tax requirement. (The certificate reflects the Commonwealth's permission for the business use of roads. KRS 281.615, *Eastridge* v. *Southeastern Greyhound Lines*, 280 Ky. 392, 133 S.W.2d 95 (1939). Once permission is received, the holder becomes accountable under the statute for the usage tax.) The holder can choose either to remit an assessment under KRS 138.460 at the time its vehicles are registered in Kentucky, or it can pay a 5% levy against its gross rental or lease charges.

Is vehicle registration a prerequisite for the tax liability? Clearly under the first option it is; however, the Commonwealth argues that the tax is directed to usage of Kentucky roads and that it relates to the value of the cars used thereon, not the situs of registration.

Looking to KRS 138.463(3) we find:

> In the event the holder of such certificate qualifies under subsection (2) and elects to pay the usage tax by the alternate method as provided in subsection (1), he shall present his cer-

> tificate to the county clerk at the time the motor vehicle is offered for registration in Kentucky . . . .

To our satisfaction this reflects the Legislature's intent that registration in Kentucky precede taxation, whether it be under KRS 138.460 or under the alternative method indicated in KRS 138.463(1). We concur with the Franklin Circuit Court's reasoning that to do otherwise and permit collection of usage taxes from the entire fleet, despite testimony relating to the significant out-of-state usage of the vehicles, would be violative of the interstate commerce clause of the U. S. Constitution.

Applying that reasoning to the facts herein, we hold that registration is a prerequisite for usage taxation of a U-Drive-It certificate holder. For those automobiles for which registration is not required, the tax is not assessable.

We need not determine whether an appropriate number of Budget's cars are registered in Kentucky, for this is a matter which was negotiated between and accepted by both the Kentucky Department of Transportation and Budget Rent A Car. Accordingly, the Revenue Cabinet is limited in its tax considerations to the 19.66% of Budget's fleet which it agreed to license in Kentucky.

With regard to that portion of its rental vehicles, Budget opted to remit 5% of its gross rental or lease charges. In doing so it omitted items such as collision

insurance, personal protection insurance, accident charges, and drop-off charges to reach gross rental or lease charges. On the other hand the Commonwealth urges that ALL charges attendant to the rentals be included.

The lower Court distinguished the above-mentioned items from rental charges, noting that they did not involve compensation for the use of property, the commonly understood definition of "rental." On appeal the Commonwealth argues the contrary; however, it is unable to cite us, as it was unable to cite the Court below, to case authority in its favor. Without such we are not able to state that the weight was so clearly in its favor that the Circuit Court erred in not finding on its behalf. Therefore, the determination that only compensation costs, exclusive of attendant fees, are taxable under KRS 138.463 stands.

For all the aforementioned reasoning the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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OPINION OF THE FRANKLIN CIRCUIT COURT (RENDERED IN THE CASE)

FRANKLIN CIRCUIT COURT
FIRST DIVISION
CIVIL ACTION NO. 82-CI-1017

BUDGET RENT A CAR OF
CINCINNATI, INC. APPELLANT

VS. **OPINION AND JUDGMENT**

REVENUE CABINET
COMMONWEALTH OF KENTUCKY
AND KENTUCKY BOARD OF TAX
APPEALS APPELLEES

* * * * * * * * * * * * * * *

The Appellant is an Indiana corporation which is in the business of leasing passenger automobiles to the public, from several locations in Cincinnati, and also from the Greater Cincinnati Airport — which is located in Kentucky, about thirteen (13) miles from the Interstate bridge. The typical car leased at the airport is immediately driven across the river into Ohio.

It is the contention of the Appellee that the Kentucky legislature had the right to, and intended to, impose a use tax on one hundred percent (100%) of the use of an automobile leased at the airport, because the lease transaction occurred in Kentucky, irrespective of where the automobile is used. The Appellee further sought to apply the tax, which the legislature had im-

posed on "rental or lease" payments, to insurance premiums, fuel costs, and the charges for delivery services which Budget performs for its customers.

After a "final ruling" by Appellee and an appeal by the Appellant, the Board of Tax Appeals made no findings of fact, but rendered an Opinion. The Board determined that it could not judge the constitutionality of the government's interpretation of the statute, but it gave Appellee's broad reading to the statute. The Board also made no ruling on the applicability of the rental or lease tax to insurance premiums and services. It upheld Appellee's assessment; and Appellant appealed to this court.

Under KRS 281.014(4), a "U-Drive-It" is a unique business for purposes of Kentucky's statutes. The term encompasses businesses which lease cars on a temporary basis to individuals and companies, and furnish no driver. Under KRS 281.011(1), such a business is included in the class of "carrier" and "motor carrier" for regulatory purposes. Therefore, KRS 281.615 requires that the business obtain a certificate or permit from the same state authorities which regulate all other carriers. The Appellant has such a permit.

KRS 138.450 et seq. provides for a usage tax on motor vehicles which — under KRS 138.455 — is separate from the general sales and use taxes payable upon other personal property in Kentucky. The motor

vehicle usage tax is imposed by KRS 138.460, and is a tax "on the use in this state of every motor vehicle". Under statute, it is to be construed as the tax "on the privilege of using a motor vehicle upon the highways of this Commonwealth". The basic tax is described as being a tax of five percent (5%) "upon its retail price".

Under KRS 138.463, however, there is an optional means for U-Drive-It companies to pay the usage tax. Companies may pay the usage tax of 5%, computed upon the amount of "the gross rental or lease charges paid by customer". This alternative computation is payable monthly on reports filed with the Revenue Department. The statute provides that the U-Drive-It company shall certify its election "at the time the motor vehicle was offered for registration in Kentucky".

The Appellant made such an election, and filed monthly returns for each of the years here in question and paid a usage tax of five percent (5%) of all rentals, on any vehicles registered in Kentucky and leased from Kentucky.

The Commonwealth seeks to tax the rentals paid to the Appellant upon vehicles which were not registered in Kentucky, but which are leased in Kentucky at the airport. Appellee's fundamental claim is that all vehicles leased in Kentucky should be treated *as if* they had been registered in Kentucky, and *as if* the statutory election had been made.

The interstate commerce clause, U.S. Const. art. 1, §8, ch. 3, prohibits undue burdens on interstate commerce; and state tax burdens must be "fairly apportioned to activities . . . within the state". *Kentucky Natural Gas Corp.* v. *Public Service Commission*, 28 F.Supp. 509 (E.D. Ky. 1939). KRS 138.455 provides such a test, requiring that the "tax imposed by KRS 138.450 to 138.470 shall be construed as a tax on the privilege of using a motor vehicle upon the public highways of this commonwealth. . . ." In *George* v. *Scent*, Ky., 346 S.W.2d 784 (1961), the court held that the motor vehicle usage tax is "imposed upon the privilege of *use* of motor vehicles *in the state*". (Second italics added) In *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950), it is held that a tax is invalid if it is "out of line with fair compensation due to [the state]". Justice Frankfurter in a dissent held that "tax formulas dependent on actual use of the state's highways satisfy the constitutional test . . . since they reflect an obvious relationship between what is demanded and what is given by the State".

Kentucky has adopted reasoning similar to Justice Frankfurter in *Commonwealth* v. *Ashland Oil & Refining Co.*, Ky., 449 S.W.2d 904 (1970); but it need not be held here that "actual use" is the only possible test. Here the statute itself commands such a limited construction.

Appellant has been assessed taxes which were imposed by the statue to be for the "use" of motor vehicles "within the state", while the vast majority of the actual use of those vehicles was, in fact, in other states — to the extent of 86% of 84% of the leases executed in Kentucky. This plainly constitutes an undue burden on interstate commerce, and just as plainly was not contemplated by the legislature.

The Commonwealth has a burden to show a rough attempt at fairness; and they have shown nothing. *Square D Company* v. *Kentucky Board of Tax Appeals*, Ky., 415 S.W.2d 594 (1967).

The Board's Opinion says:

> Appellant failed, or neglected, to apply for a fleet allocation formula under KRS 138.463, and the administrative regulations promulgated pursuant thereto. It was appellant's obligation to apply for a fleet allocation unless it wished to pay the full tax prescribed by the statute.

The Board thus suggests that there is somewhere in the statutory scheme an effort to be fair to businesses like Appellant's. We can find no such provision in the statute. There is a "fleet proration" exemption under KRS 138.470(5). The "administrative regulations" must be 103 KAR 44:1010(b) and 103 KAR 44:020 which are promulgated pursuant to KRS 138.470(5). A careful reading of these sources, however, shows that it is

only a "commercial vehicle" which may be registered in this manner. KRS 186.050(1) and 186.050(3)(b). Those statutes limit the exception to vehicles with not more than nine (9) passengers. Appellant leases no such vehicles. KRS 186.050(14)(c) also requires that such allocations be made under "agreements with other jurisdictions". Appellee had admitted that there is no agreement with Ohio on this subject.

The legislature is presumed not to intend violation of the Constitution; and we the taxing authorities cannot be permitted to go beyond the proper intent.

Since the basic tax is not properly to be collected by the Commonwealth, there is no need for this Court to discuss the matters also raised by the Appellant with respect to the Statute of Limitations thereon, and the penalties which the Commonwealth sought so to impose upon the Appellant. It is necessary, however, to decide one remaining issue, which is the attempted imposition by the Appellee of a use tax on "rental or lease" payments, to insurance premiums, fuel and so-called "drop off" charges paid by customers to Budget when the customer chooses to leave the vehicle at some place other than the location where he or she rented the car. On this issue, neither side was able to cite a case precisely in point from this or any other jurisdiction, although Appellant cited cases which note generally that "rentals" are charges made as compensation for the temporary use of property. Perhaps the reason there are no cases cited

which are precisely in point is that the Commonwealth's position is insupportable and has not elsewhere been argued. Insurance premiums are compensation for the shifting of the risk of various losses; and the "drop off" charges are payments for personal services. Fuel costs may or may not be paid by the lessee as part of "rental or lease" payments, but in any event, they are separate and distinct from vehicle rental. Although such charges, and many others imaginable, are made in the connection with the lease of personal property, they in no way involve the compensation for the use of the property. A tax which specifies its subject matter should not be expanded to cover a different subject matter, and so we hold that this tax covers only what the legislature said and intended.

IT IS THEREFORE ORDERED AND ADJUDGED that the Appellant's appeal is sustained, the Opinion and Order of the Kentucky Board of Tax Appeals is reversed, and the Appellee's assessment of additional taxes for Appellant is null and void all at Appellee, Commonwealth's costs. This is a final Judgment and no reason exists for delay in entry hereof.

This 5th day of December, 1983.

/s/ Henry Meigs
JUDGE, FRANKLIN CIRCUIT COURT
DIVISION I

COPIES TO:

Hon. Robert S. Miller
Miller, Griffin & Marks, P.S.C.
Suite 700, Security Trust Bldg.
Lexington, Kentucky 40507-1292

Hon. Charles W. Kurtz
New Capitol Annex
Frankfort, Kentucky 40620

Hon. Edward Prichard
Kentucky Board of Tax Appeals
The 127 Building
Frankfort, Kentucky 40601

* * * * * * *

OPINION OF THE KENTUCKY BOARD OF TAX APPEALS (RENDERED IN THE CASE)

KENTUCKY BOARD OF TAX APPEALS
FILE NO. K81-R-38

BUDGET RENT A CAR OF
CINCINNATI, INC. APPELLANT

VS. ORDER NO. K-8062

REVENUE CABINET
COMMONWEALTH OF KENTUCKY APPELLEE

This is an appeal of a final ruling of the Revenue Cabinet assessing a motor vehicle usage tax deficiency of $255.526.00 plus penalties and interest against Budget Rent A Car of Cincinnati, Inc. The issues involve the interpretation of KRS 138.463 and the administrative regulations promulgated pursuant thereto and their application in this case; the constitutionality of Kentucky's motor vehicle usage tax statutes; state of limitations; definition of gross rental or lease charges paid by a customer or lessee renting or leasing a motor vehicle; and application of KRS 131.180 in this case.

FINDINGS OF FACT

1. Budget Rent A Car of Cincinnati, Inc., (appellant) is a motor carrier engaged in renting/leasing passenger automobiles at the Greater Cincinnati Air-

port in Boone County, Kentucky. Appellant operates under U-Drive-It certificate number 237 issued by the Kentucky Department of Transportation.

2. The Revenue Cabinet conducted an audit of appellant's rental/leasing receipts at the Airport in Kentucky for the periods of April 1, 1975 through January 31, 1980. As a result of the audit, appellant was assessed for a motor vehicle usage tax deficiency of $255,526.00, plus penalties and interest.

3. Appellant is engaged in interstate commerce or a combination of interstate/intrastate commerce.

4. During the audit period, appellant's rental fleet averaged in number between 236 vehicles annually and 350 vehicles annually. An average of less than twenty percent of appellant's vehicles rented/leased at the Cincinnati airport in Kentucky were registered in Kentucky.

5. Appellant paid less than ten percent of the total motor vehicle usage taxes assessed on the vehicles rented/leased in Kentucky.

6. Appellant failed to apply for a fleet allocation formula pursuant to KRS 138.463 and Kentucky Administrative Regulations 103 KAR 44:020 and 601 KAR 9:045.

7. Gross rental or lease charges paid by a customer or lessee renting or leasing a motor vehicle from appellant included time and mileage, collision protection, personal protection, accident charge and drop off fees.

8. Appellee's audit for the period beginning April 1, 1975 through January 31, 1980 was conducted March 3, 1980. The audit assessment was mailed to appellant April 8, 1980, and appellant protested the assessment on May 7, 1980, pursuant to KRS 131.110.

9. Kentucky's motor vehicle usage tax statutes contain no penalty provisions for failure to file and failure to pay taxes. KRS 138.450-KRS 138.470. The legislature has provided a general penalty statute in KRS 131.180.

CONCLUSIONS OF LAW

1. Appellant operates in interstate/intrastate commerce and is required to file for a fleet allocation formula under KRS 138.463 and the administrative regulations promulgated pursuant thereto. It was appellant's obligation to apply for a fleet allocation unless it wished to pay the full tax prescribed by KRS 138.463.

2. The Kentucky Board of Tax Appeals has no jurisdiction to determine the constitutionality of Kentucky's taxing statutes. *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 90 L.Ed. 358, 364; 66 S.Ct. 445 (1946); Davis, *Administrative Law Treatise*, Chapter 20.04, page 74 (1958).

3. KRS 413.120(2) provides that an action upon a liability created by statute creating the liability shall be commenced within five years after the cause of

action *accrued.* The assessment is not final, due and owing until appellant's protest filed pursuant to KRS 131.110 is decided by the board and the matter has been prosecuted to an ultimate conclusion through the appellate courts. Statute of limitations are tolled while proceedings are pending before this board. The statute begins to run after, not before, the case is brought here.

4. Gross rental or lease charges paid by a customer or lessee renting or leasing a motor vehicle from appellant which are subject to the five percent tax imposed by KRS 138.463 are the gross sums received by appellant without deductions. Black's Law Dictionary defines "gross" to mean "whole, entire, total as the gross sum, amount, weight—opposed to net." Rent is defined by Black's Law Dictionary as "consideration paid for use of property." All words and phrases shall be construed according to the common and approved usage of language. KRS 446.080(4). Taken at their common meaning the words "gross rental or lease charges" mean the total or gross amount received by appellant for use of the vehicle for the rental or lease period without deductions.

5. When no specific penalty for failure to file or pay a tax is provided by statute, the general penalty statute applies. KRS 131.180 provides that "any person who fails to make any tax report or return to pay any tax within the time required by law, shall pay a penalty of ten percent of the tax due, with interest

from the date due at one percent a month or part thereof." Appellant is subject to the penalty provided by KRS 131.180.

ORDER

IT IS THEREFORE ORDERED that the final ruling of the Revenue Cabinet is affirmed and the taxpayer's appeal dismissed. The Cabinet's deficiency assessment of motor vehicle usage tax in the amount of $255,526.00, plus penalty and interest until paid, against appellant, Budget Rent A Car of Cincinnati, Inc. is confirmed and declared, and appellant is ordered to pay same forthwith.

This 30th day of July, 1982.

KENTUCKY BOARD OF TAX APPEALS
/s/ Edward F. Prichard, Jr., Chairman
Edward F. Prichard, Jr., Chairman

ATTEST:
/s/ Ellis A. Merrifield, Clerk
Ellis A. Merrifield, Clerk

* * * * * * * *

KENTUCKY BOARD OF TAX APPEALS
FILE NO. K81-R-38

BUDGET RENT A CAR OF
CINCINNATI, INC. APPELLANT

VS. OPINION

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF REVENUE APPELLEE

Appellant failed, or neglected, to apply for a fleet allocation formula under KRS 138.463, and the administrative regulations promulgated pursuant thereto. It was appellant's obligation to apply for a fleet allocation unless it wished to pay the full tax prescribed by the statute.

Appellant's other argument cannot prevail. We have no jurisdiction to determine the constitutionality of Kentucky's taxing statutes; and if we did have such jurisdiction we should not be inclined to hold the applicable statute unconstitutional. It strikes us as a permissible method of exacting compensation from those who use Kentucky's highways and create Kentucky traffic.

Statutes of limitations do not apply to proceedings pending before this Board. The statute begins to run after, not before, the case is brought here.

The Department's final ruling is SUSTAINED and the appeal dismissed.

Counsel for the appellee are directed to prepare proposed findings of fact, conclusions of law, and proposed order pursuant to this opinion, for consideration by the Board, within 30 days from the date of this opinion, with copy to be served upon appellant's counsel for comment within 15 days thereafter, at the conclusion of which time the Board will prepare its own findings of fact and conclusions of law.

This 7th day of June, 1982.

KENTUCKY BOARD OF TAX APPEALS
/s/ Edward F. Prichard, Jr.
Edward F. Prichard, Jr., Chairman

ATTEST:
/s/ Ellis A. Merrifield
Ellis A. Merrifield, Clerk

* * * * * * * *

OPINION OF THE SUPREME COURT OF KENTUCKY (THE JUDGMENT APPEALED FROM)

RENDERED: January 16, 1986
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
No. 84-SC-991-DG

REVENUE CABINET, COMMONWEALTH OF KENTUCKY — MOVANT

ON REVIEW FROM THE COURT OF APPEALS
V. No. 84-CA-707-MR
(Franklin Circuit Court No. 82-CI-1017)

BUDGET RENT-A-CAR OF CINCINNATI, INC. — RESPONDENT

OPINION OF THE COURT BY JUSTICE GANT

REVERSING AND REMANDING

Budget Rent-A-Car of Cincinnati, Inc., among its operations, maintains an automobile rental outlet at Greater Cincinnati Airport, which is located in Boone County, Kentucky. Rentals at that site comprise some 60% of the total business of the corporation. Pursuant to the applicable statutes and regulations of this state, an allocation formula was devised and agreed to by which Budget registered some 19% of the vehicles used at this location in Kentucky, the remainder being registered in Ohio. This action concerns the usage tax

payable to the Commonwealth under the applicable law of the state.

The statute pertaining to the question is:

KRS 138.463. Collection of tax on U-Drive-It.—(1) A holder of a certificate as required under KRS 281.615 to operate as a U-Drive-It as defined in KRS 281.014 may pay the usage tax as provided in KRS 138.460 or, subject to the provisions of subsection (2), may pay a usage tax of five per cent (5%) levied upon the amount of the gross rental or lease charges paid by a customer or lessee renting or leasing a motor vehicle from such holder of the certificate.

(2) A holder of a certificate shall pay the usage tax as provided in KRS 138.460 unless he shows to the satisfaction of the Cabinet that he is regularly engaged in the renting or leasing of motor vehicles to retail customers as part of an established business. Persons first engaging in the renting or leasing of motor vehicles to retail customers shall, in addition to obtaining a certificate required under KRS 281.615, demonstrate to the satisfaction of the Cabinet that they are prepared to qualify under the standards set forth in this subsection.

(3) In the event the holder of such certificate qualifies under subsection (2) and elects to pay the usage tax by the alternate method as provided in subsection (1), he shall present his certificate to the county clerk at the time the motor vehicle is offered for registration in Kentucky and the following provisions shall be applicable.

> (4) The tax shall be the direct obligation of the holder of the certificate but it may be charged to and collected from the customer in addition to the rental or lease charges. The tax due shall be remitted to the Revenue Cabinet.

The applicable regulation in this case is 103 KAR 44:020(6)(b):

> Fleets of vehicles operating under a U-Drive-It permit which are registered pursuant to an allocation formula by the Department of Transportation may, upon approval of the Department of Revenue, elect to pay the five per cent (5%) usage tax on revenue derived from rental or leasing of all vehicles rented or leased in Kentucky.

Under KRS 138.463(1), Budget chose to operate under this second option, which provides a usage tax of 5% upon "gross rental or lease charges paid by a customer or lessee," rather than paying the usage tax on the vehicles registered in Kentucky. However, they paid this optional tax only on the rental or lease charges on those vehicles registered in Kentucky, and not on the rental or lease charges for the entire fleet of U-Drive-Its rented at the Kentucky location. Relying upon the above quoted regulation and statute, and after a complete audit of Budget, Revenue assessed a deficiency of $255,526, plus penalties and interest, contending the regulation and the statute clearly required under the option selected by Budget that the

5% usage tax applied to all Kentucky rentals, not merely to rentals of those vehicles registered in the state.

The audit conducted by Revenue on the records of Budget disclosed that Budget had collected the 5% usage tax on all vehicles in the rental fleet, irrespective of its registration, applying the tax to the "time and mileage" charge and the collision insurance charge, but not to other charges such as the "drop-off" charge in the rental contracts. However, Budget had paid the tax thus collected on only the vehicles registered in Kentucky, pocketing the remainder.

The Board of Tax Appeals upheld the deficiency assessment, plus penalty and interest, but its Opinion and Order, written by Edward F. Prichard, Jr., Chairman, was reversed by the Franklin Circuit Court and that reversal was upheld by the Court of Appeals.

STATUTORY CONSTRUCTION

KRS 138.463 provides two alternate methods of paying taxes for U-Drive-It businesses operating in Kentucky. They may pay the usage tax of 5% provided under KRS 138.460 on the value of registered vehicles at the time of registration; or, they may pay a usage tax of 5% on the "gross rental or lease charges paid by a customer or lessee renting or leasing *a* motor vehicle . . ." There is no language of limitation if the company elects to pay its tax under the second alter-

native and yet the interpretation urged upon us and adopted by Budget (and by the Court of Appeals) would add to the second alternative, after the words "motor vehicle," the phrase "Registered in Kentucky." We cannot concur with such equivocation, and find no connection in the statute between the two alternatives which would make the first alternative an incidence of the second. *Cf. Furste* v. *Dixie Traction Company*, 286 Ky. 336, 150 S.W.2d 913 (1941).

The alternative methods are quite simple. Once the allocation formula is determined, as provided by 103 KAR 44:020, the U-Drive-It operator may pay the usage tax provided by KRS 138.460 at the time of registration, on all vehicles registered in Kentucky, and exclude those vehicles registered in another state; or they may elect to pay the 5% usage tax derived from leases entered into in this state on *all* vehicles in the rental fleet which are leased in Kentucky.

To hold otherwise would permit Budget to select the best of both alternatives. For example, the record divulges that there was annually a vast difference between the percentage of vehicles registered in Kentucky and the percentage of rental of those vehicles when compared to the entire fleet rental. Also, for two periods, one of four months and one of five months, no tax was paid at all inasmuch as no Kentucky vehicle was rented out of the entire fleet. Clearly, the statute was not intended to permit

Budget, or similar enterprises, to do business in this state on a regular basis without paying a fair and proper tax for that privilege. *Cf. Reeves* v. *Deisenroth*, 288 Ky. 724, 157 S.W.2d 331 (1941). Further, KRS 138.455 states that all taxes imposed under the applicable sections of the chapter are taxes "on the privilege of using a motor vehicle upon the public highways" of this state. Under our Constitution, the revenues from such taxes are mandated to be placed in the road fund.

CONSTITUTIONALITY

The principal thrust of Budget's argument herein is that the regulatory scheme enacted by Revenue under the statute and under the applicable regulations are violative of the United States Constitution, art. 1, § 8, CL. 3, the interstate commerce clause. Budget's contention was adopted by the Franklin Circuit Court and the Court of Appeals, but we do not agree. Although the law relating to the commerce clause has undergone cyclical changes over the past 50 years, one phrase has been repeatedly echoed in the halls of the Supreme Court of the United States. That phrase is: "It is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823 (1938).

The criteria which are to be applied to any state tax relating to interstate commerce, by whatever name such tax pay be levied, were set out in *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Those are: (1) There shall not be discrimination between foreign and state corporations; (2) There must be local activities within the taxing state to form sufficient nexus to justify the tax; (3) The tax must be properly apportioned to local activities; and (4) The tax must be related fairly to services provided by the state. Also, this case goes on to say, such tax would be upheld even though the activity was generated exclusively by interstate sales.

Applying these criteria to the case before us, we find distinct compliance with each of them. First, there is no discrimination between this Ohio corporation and any Kentucky corporation operating in the same line of business. In fact, no discrimination is even urged by the respondent. Second, the entire activities of Budget in renting its fleet at its airport location in Kentucky are intrastate, not interstate, giving more than sufficient connection, or nexus, to this state in the operation. The fact that the customer, or lessee, may go north, south, east or west from his point of Kentucky origin is his choice, not that of Budget. Also, in whichever direction he goes, he operates upon the highways of this state for some portion of the trip. This is a total answer to the third standard. The apportionment by mileage urged by Budget

is not required under the commerce clause, especially where there is this volume of local activities. *See Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053 (1950). Finally, the tax is on the privilege to use the highways in this state, not on the use itself. Although Budget may charge by the *mile* driven, the tax is a flat percentage charge for the *privilege*.

Of course, as Budget readily admits, there is no question of double taxation herein as Ohio charges no registration tax or usage tax on any of the Ohio charges no registration tax or usage tax on any of the Ohio licensed vehicles in the fleet.

STATUTORY APPLICATION

We further affirm the Board of Tax Appeals in its opinion that the tax applies to *all* charges, including "total time and mileage," "full collision insurance," "personal accident insurance," and "drop-off charges," as set out in the lease agreement with Budget as lessor and the customer as lessee. We find no ambiguity in a statute which assesses the usage tax upon "gross rental" and "gross . . . lease charges." As any dictionary definition reads, "gross" means "without deductions." If it is a charge contained in the lease, by clear meaning that is a "lease charge."

We reverse the Court of Appeals on the issues herein disposed of and remand this case to the

Franklin Circuit Court for further proceedings dealing with penalty assessment, statute of limitations, and all other issues originally raised but not disposed of in that court.

All concur.

ATTORNEY FOR MOVANT:

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Legal Services Section
Revenue Cabinet
P. O. Box 423
Frankfort, KY 40602

ATTORNEY FOR RESPONDENT:

Robert S. Miller
Miller, Griffin & Marks, P.S.C.
700 Security Trust Building
Lexington, KY 40507

* * * * * * *

ORDER OF THE SUPREME COURT OF KENTUCKY (ORDER ON REHEARING)

SUPREME COURT OF KENTUCKY
84-SC-991-DG

REVENUE CABINET, COMMONWEALTH OF KENTUCKY — MOVANT

ON REVIEW FROM COURT OF APPEALS
V. 84-CA-707-MR
Franklin Circuit Court No. 82-CI-1017

BUDGET RENT A CAR OF CINCINNATI — RESPONDENT

ORDER

The motion of the "amicus petitioners" for leave to file an amicus petition for rehearing and modification of the opinion rendered in the above-styled action is denied.

Gant, Leibson, Stephenson and Vance, JJ., sitting. All concur.

ENTERED March 12, 1986.

/s/ Robert F. Stephens
Chief Justice

* * * * * * *

NOTICE OF APPEAL

FILED
MAR 20 1986
John C. Scott
CLERK
SUPREME COURT

SUPREME COURT OF KENTUCKY

REVENUE CABINET, COMMONWEALTH OF KENTUCKY — APPELLANT

v.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES NO. 84-SC-991-DG

BUDGET RENT-A-CAR OF CINCINNATI, INC. — APPELLEE

* * * * * *

Notice is hereby given that Budget Rent-A-Car of Cincinnati, Inc., the Appellee above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Kentucky, reversing and remanding the judgment of the Court of Appeals of Kentucky. The date of entry of the judgment appealed from is January 16, 1986. The appeal is taken pursuant to 28 U.S.C. § 1257(2).

MILLER, GRIFFIN & MARKS, P.S.C.
BY: /s/ Robert S. Miller
ROBERT S. MILLER
700 Security Trust Building
Lexington, Kentucky 40507
Phone: (606) 255-6676

ATTORNEY FOR BUDGET RENT-A-CAR OF CINCINNATI, INC.

CERTIFICATE OF SERVICE

This is to certify that the foregoing Notice of Appeal was served this 20th day of March, 1986, in compliance with Rules 10 and 28 of the Supreme Court of the United States, by depositing same in a United States post office or mailbox, with first-class postage prepaid, addressed to the following: Hon. Ross T. Carter, Legal Services Section, Revenue Cabinet, P.O. Box 423, Frankfort, Kentucky 40602; Hon. David L.

Armstrong, Attorney General, Office of the Attorney General, 116 Capitol Building, Frankfort, Kentucky 40601; John C. Scott, Clerk, Supreme Court of Kentucky, New Capitol, Frankfort, Kentucky 40601; and Eunice Moore, Clerk, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky 40601. All parties required to be served have been served.

/s/ Robert S. Miller
ROBERT S. MILLER

* * * * * * * *

FILED
MAR 20 1986
John C. Scott
CLERK
SUPREME COURT

FRANKLIN CIRCUIT COURT
CIVIL BRANCH
DIVISION I

BUDGET RENT-A-CAR OF
CINCINNATI, INC. APPELLANT

NOTICE OF APPEAL TO THE

v. **SUPREME COURT** NO. 82-CI-1017

OF THE UNITED STATES

REVENUE CABINET, COMMONWEALTH
OF KENTUCKY APPELLEE

* * * * * *

Notice is hereby given that Budget Rent-A-Car of Cincinnati, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Kentucky, reversing and remanding the judgment of the Court of Appeals of Kentucky. The date of entry of the judgment appealed from is January 16, 1986. The appeal is taken pursuant to 28 U.S.C. § 1257(2).

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/s/ Robert S. Miller
ROBERT S. MILLER

* * * * * * *

FILED
MAR 20 1986
EUNICE MOORE
CLERK FRANKLIN CIRCUIT COURT

FRANKLIN CIRCUIT COURT
CIVIL BRANCH
DIVISION I

BUDGET RENT-A-CAR OF
CINCINNATI, INC. APPELLANT

v. **NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES** NO. 82-CI-1017

REVENUE CABINET, COMMONWEALTH
OF KENTUCKY APPELLEE

* * * * * *

Notice is hereby given that Budget Rent-A-Car of Cincinnati, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Kentucky, reversing and remanding the judgment of the Court of Appeals of Kentucky. The date of entry of the judgment appealed from is January 16, 1986. The appeal is taken pursuant to 28 U.S.C. § 1257(2).

MILLER, GRIFFIN & MARKS, P.S.C.
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ROBERT S. MILLER

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ATTORNEY FOR BUDGET RENT-A-CAR
OF CINCINNATI, INC.

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/s/ Robert S. Miller
ROBERT S. MILLER

A Copy Attest
/s/ Eunice Moore by WHAC
Clerk Franklin Circuit Court

* * * * * * *

FILED
MAR 20 1986
EUNICE MOORE
CLERK FRANKLIN CIRCUIT COURT

SUPREME COURT OF KENTUCKY

REVENUE CABINET, COMMONWEALTH OF KENTUCKY — APPELLANT

v.

BUDGET RENT-A-CAR OF CINCINNATI, INC. — APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES NO. 84-SC-991-DG

* * * * * *

Notice is hereby given that Budget Rent-A-Car of Cincinnati, Inc., the Appellee above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Kentucky, reversing and remanding the judgment of the Court of Appeals of Kentucky. The date of entry of the judgment appealed from is January 16, 1986. The appeal is taken pursuant to 28 U.S.C. § 1257(2).

MILLER, GRIFFIN & MARKS, P.S.C.
BY: /s/ Robert S. Miller
ROBERT S. MILLER
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ATTORNEY FOR BUDGET RENT-A-CAR
OF CINCINNATI, INC.

CERTIFICATE OF SERVICE

This is to certify that the foregoing Notice of Appeal was served this 20th day of March, 1986, in compliance with Rules 10 and 28 of the Supreme Court of the United States, by depositing same in a United States post office or mailbox, with first-class postage prepaid, addressed to the following: Hon. Ross T. Carter, Legal Services Section, Revenue Cabinet, P.O. Box 423, Frankfort, Kentucky 40602; Hon. David L. Armstrong, Attorney General, Office of the Attorney General, 116 Capitol Building, Frankfort, Kentucky 40601; John C. Scott, Clerk, Supreme Court of Kentucky, New Capitol, Frankfort, Kentucky 40601; and Eunice Moore, Clerk, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky 40601. All parties required to be served have been served.

/s/ Robert S. Miller
ROBERT S. MILLER

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CONSTITUTIONAL PROVISION, STATUTES, AND REGULATION (THAT THE CASE INVOLVES)

Article 1, section 8, clause 3, United States Constitution:

> [The congress shall have power] . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes. . . .

Fourteenth Amendment, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KRS § 138.455:

> KRS 138.455. Construction of KRS 138.450 to 138.470. —
>
> The tax imposed by KRS 138.450 to 138.470 shall be construed as a tax on the privilege of using a motor vehicle upon the public highways of this commonwealth and shall be separate and distinct from all other taxes imposed by this com-

monwealth. The provision of KRS 138.450 to 138.470 shall in no way be construed together with the provisions of KRS chapters 132 or 139.

KRS § 138.460:

KRS 138.460. Motor vehicles usage tax — Imposition — Rate — Collection — Refunds. —

(1) On and after July 1, 1972 a tax levied upon its retail price at the rate of five percent shall be paid on the use in this state of every motor vehicle, except those excempted by KRS 138.470, at the time and in the manner provided in this section. In the case of trucks of gross weight in excess of ten thousand pounds (10,000 lbs.) the tax shall be levied upon ninety percent (90%) of the retail price of the vehicle.

(2) The tax shall be collected by the county clerk or other officer with whom the vehicle is required to be registered:

(a) When he collects the registration fee for registering and licensing a motor vehicle the first time it is offered for registration in this state,

(b) Or upon the transfer of ownership of any motor vehicle previously registered in this state.

(3) The tax collected by the county clerk under this section shall be reported and remitted to the department of revenue on forms provided by the department and on such forms as the department may prescribe. The county clerk shall for his services in collecting the tax be entitled to retain an amount equal to two and one-half percent (2½%) of the tax collected and accounted for.

(4) No county clerk or other officer shall register or issue any license tags to the owner of any motor vehicle subject to this tax, when the vehicle is then being offered for registration for the first time, or transfer the ownership of any motor vehicle previously registered in this state, unless the owner or his agent pays the tax levied under this section in addition to the transfer, registration and license fees.

(5) When a resident of this state offers a motor vehicle for registration for the first time in this state which was registered in another state that levied a tax substantially identical to the tax levied under this section, such person shall be entitled to receive a credit against the tax imposed by this section equal to the amount of tax paid to the other state. No credit shall be given under this subsection for taxes paid in another state if that state does not grant similar credit for substantially identical taxes paid in this state.

(6) No county clerk or other officer shall register or issue any license tags to the owner of any motor vehicle subject to this tax, when the vehicle is then being offered for registration for the first time, unless the seller or his agent delivers to the county clerk or other officer a certified or photostat copy of the manufacturer's price label for passenger cars or a certified or photostat copy of the itemized billing to the customer in the case of all other motor vehicles; and the clerk shall attach the certified or photostat copy to the certificate of registration and ownership mailed to the department.

(7) Notwithstanding the provisions of KRS 138.450(3), in no case shall the tax be less than five dollars ($5.00) upon first registration of or any transfer of ownership of a motor vehicle in this state, except where such vehicle is exempt from tax under KRS 138.470.

(8) Where a new motor vehicle is sold by a dealer in this state and the original purchaser returns the vehicle for any reason to the same dealer within sixty (60) days for a new vehicle replacement or a refund of the purchase price, the purchaser shall be entitled to a refund of the amount of usage tax received by the department of revenue as a result of the registration of the returned vehicle. The registration of the returned vehicle shall be cancelled and the vehicle shall be considered to have not been previously registered in Kentucky when resold by the dealer.

(9) When a manufacturer refunds the retail purchase price or replaces a new motor vehicle for the original purchaser within ninety (90) days because of malfunction or defect, the purchaser shall be entitled to a refund of the amount of motor vehicle usage tax received by the department of revenue as a result of the first registration. No person shall be entitled to a refund unless he shall have filed with the department of revenue an affidavit from the manufacturer identifying the vehicle that was replaced and stating the date of replacement.

KRS § 138.463:

KRS 138.463. Collection of tax on U-Drive-It.—

(1) On and after January 1, 1973, a holder of a certificate as required under KRS 281.615 to operate as a U-Drive-It as defined in KRS 281.014 may pay the usage tax as provided in KRS 138.460 or may pay a usage tax of five per cent (5%) levied upon the amount of the gross rental or lease charges paid by a customer or lessee renting or leasing a motor vehicle from such holder of the certificate.

(2) In the event the holder of such certificate elects to pay the usage tax by the alternate method as provided in subsection (1), he shall present his certificate to the county clerk at the time the motor vehicle is offered for registration in Kentucky and the following provisions shall be applicable.

(3) The tax shall be the direct obligation of the holder of the certificate but it may be charged to and collected from the customer in addition to the rental or lease charges. The tax due shall be remitted to the department of revenue each month on forms and pursuant to regulations promulgated by the department.

(4) Failure of the holder of the certificate to remit the taxes applicable to the rental and leasing charges as provided herein shall be sufficient cause for the bureau of vehicle regulation to void the certificate issued to such holder and the usage tax on each of the motor vehicles which had been registered by the holder under the certificate shall be due and payable on the retail price of each such

motor vehicle when it was first purchased by the holder.

KRS § 138.470:

KRS 138.470. Exemptions from tax.—

There is expressly exempted from the tax imposed by KRS 138.460:

(1) Motor vehicles sold to the United States, or to the Commonwealth of Kentucky or any of its political subdivisions;

(2) Motor vehicles sold to institutions of purely public charity and institutions of education not used or employed for gain by any person or corporation;

(3) Motor vehicles which have been previously registered and titled in any state or by the federal government when being sold or transferred to licensed motor vehicle dealers for resale. Such motor vehicles shall not be leased, rented or loaned to any person and must be held for resale only;

(4) Motor vehicles sold by or transferred from dealers registered and licensed in compliance with the provisions of KRS 186.070 and KRS 190.010 to 190.080 to to nonresident members of the armed forced on duty in this Commonwealth under orders from the United States government;

(5) Commercial motor vehicles, excluding passenger vehicles having a seating capacity for nine (9) persons or less, owned by nonresident owners and used primarily in interstate commerce

and based in a state other than Kentucky which are required to be registered in Kentucky by reason of operational requirements or fleet proration agreements and are registered pursuant to KRS 186.145;

(6) Motor vehicles previously registered in Kentucky, transferred between husband and wife or parent and child;

(7) Motor vehicles transferred when a business changes its name and no other transaction has taken place or an individual changes his or her name;

(8) Motor vehicles transferred to a corporation from a proprietorship, or from a corporation to a proprietorship, within six (6) months from the time that the business is incorporated or dissolved.

(9) Motor vehicles transferred by will, court order, or under the statutes covering descent and distribution of property;

(10) Motor vehicles transferred between a subsidiary corporation and its parent corporation when there is no consideration, or nominal consideration, or in sole consideration of the cancellation or surrender of stock;

(11) The interest of a partner in a motor vehicle when other interests are transferred to him;

(12) Motor vehicles repossessed by a secured party who has filed a financing statement as required by KRS 186.045(2) and a repossession affidavit as required by KRS 186.045(6). The repossessor must hold the vehicle for resale only and not for

personal use unless he has previously paid the motor vehicle usage tax on said vehicle;

(13) Motor vehicles transferred to an insurance company to settle a claim. Such vehicles shall be junked or held for resale only.

KRS § 186.020:

KRS 186.020. Registration requirement — Application for registration — Application and other documents to be sent to department of transportation.

(1) Before the owner of a motor vehicle, other than a motor vehicle engaged in the transportation of passengers for hire operating under a certificate of convenience and necessity, may operate it or permit its operation upon a highway, the owner shall apply for registration in accordance with regulations issued by the department, except that a person who purchases a motor vehicle, or brings a motor vehicle into the Commonwealth from another state shall make application for registration within five (5) days. The bill of sale or assigned title must be in the motor vehicle during this five-day period. If the owner of a motor vehicle is an individual and resides in the Commonwealth, the motor vehicle shall be registered with the county clerk of the county in which he resides. If the owner of a motor vehicle does not reside in the Commonwealth, the motor vehicle shall be registered with the county clerk of the county in which the motor vehicle is principally operated. If the owner of a motor vehicle is

other than an individual and resides in the Commonwealth, the motor vehicle shall be registered with the county clerk of either such county. The application when presented to the county clerk for registration shall be accompanied by:

(a) A bill of sale and a manufacturer's certificate of origin if the application is for the registration of a new motor vehicle; or

(b) The owner's registration receipt, if the motor vehicle was last registered in this state; or

(c) A bill of sale and the previous registration receipt, if last registered in another state where the law of such state does not require the owner of a motor vehicle to obtain a certificate of title or ownership; or

(d) A certificate of title, if last registered in another state where the law of such state requires the owner of a motor vehicle to obtain a certificate of title or ownership.

(2) (a) After that, the owner of any motor vehicle registered under KRS 186.050(1) shall register his motor vehicle on or before his certificate of registration expires. If, before operating such motor vehicle in this state, the owner registers it at some later date and pays the fee for the full year, he will be deemed to have complied with the law. Insofar as the owner is concerned, registration with the clerk shall be deemed to be registration with the bureau.

(b) After that, the owner of any motor vehicle registered under KRS 186.050(2) shall register his motor vehicle on or before March 1 of each year.

If, before operating such motor vehicle in this state, the owner registers in this state, the owner registers it at some later date and pays the fee for the full year, he will be deemed to have complied with the law. Insofar as the owner is concerned, registration with the clerk shall be deemed to be registration with the bureau.

(3) After that, the owner of any commercial vehicle registered under KRS 186.050(3) through (14) shall register his commercial vehicle on or before April 1 of each year. If, before operating such commercial vehicle in this state, the owner registers it at some later date and pays the required fee, he will be deemed to have complied with the law. Insofar as the owner is concerned, registration with the clerk shall be deemed to be registration with the bureau.

(4) The application and documents presented therewith, including the sheriff's certificate of inspection, shall be affixed to the department of transportation copy of the certificate of title or registration and sent to the department of transportation by the clerk.

KRS § 186.050:

KRS 186.050. Registration fees. —

(1) The annual registration fee for motor vehicles, including taxicabs, airport limousines and U-Drive-Its, primarily designed for carrying passengers and having provisions for not more than nine (9) passengers, including the operator, shall be eleven dollars and fifty cents ($11.50).

(2) The annual registration fee for each motorcycle shall be five dollars ($5.00), and for each sidecar attachment, three dollars ($3.00).

(3) (a) All motor vehicles having a declared gross weight of vehicle and any towed unit of six thousand (6,000) pounds or less except those mentioned in subsections (1) and (2) of this section and those engaged in hauling passengers for hire, operating under certificates of convenience and necessity, are classified as commercial vehicles and the annual registration fee, except as provided in subsections (4) to (14) hereof, shall be eleven dollars and fifty cents ($11.50).

(b) All motor vehicles except those mentioned in subsections (1) and (2) of this section, and those engaged in hauling passengers for hire, operating under certificates of convenience and necessity, are classified as commercial vehicles and the annual registration fee, except as provided in subsections (3)(a) and (4) to (14) hereof, shall be as follows:

DECLARED GROSS WEIGHT OF VEHICLE AND ANY TOWED UNIT	REGISTRATION FEE
6,001 - 10,000	$ 24.00
10,000 - 14,000	$ 30.00
14,001 - 18,000	$ 50.00
18,001 - 22,000	$132.00
22,001 - 26,000	$160.00
26,001 - 32,000	$216.00
32,001 - 38,000	$300.00
38,001 - 44,000	$474.00
44,001 - 55,000	$544.00
55,001 - 62,000	$588.00

62,001 - 73,280	$750.00
73,281 - 82,000	$840.00

(4) (a) Any farmer owning a truck having a gross weight of thirty-eight thousand (38,000) pounds or less may have it registered as a farmer's truck and obtain a license for eleven dollars and fifty cents ($11.50). The applicant's signature upon the certificate of registration and ownership shall constitute a certificate that he is a farmer engaged solely in the production of crops, livestock or dairy products, that he owns a truck of the gross weight of thrity-eight thousand (38,000) pounds or less, and that during the next twelve (12) months the truck will be used only in transporting persons, food, provender, feed, machinery, livestock, material and supplies necessary for his farming operation, and the products grown on his farm.

(b) Any farmer owning a truck having a declared gross weight in excess of thirty-eight thousand (38,000) pounds shall not be required to pay the fee set out in subsection (3) of this section and, in lieu thereof, shall pay forty percent (40%) of the fee set out in subsection (3) hereof. The applicant's signature upon the registration receipt shall be considered to be a certification that he is a farmer engaged solely in the production of crops, livestock or dairy products, and that during the current registration year the truck will be used only in transporting person, food, provender, feed and machinery used in operating his farm and the products grown on his farm.

(5) Any person owning a truck or bus used solely in transporting school children and school employees may have the truck or bus registered as a school bus and obtain a license for eleven dollars and fifty cents ($11.50) by filing with the county clerk, in addition to other information required, an affidavit stating that the truck or bus is used solely in the transportation of school children and persons employed in the schools of the district, that he has caused to be printed on each side of the truck or bus and on the rear door the words "School Bus" in letters at least six (6) inches high and of a conspicuous color and the truck or bus will be used during the next twelve (12) months only for the purpose stated.

(6) Any church or religious organization owning a truck or bus used solely in transporting persons to and from a place of worship or for other religious work may have the truck or bus registered as a church bus and obtain a license for eleven dollars and fifty cents ($11.50) by filing with the county clerk, in addition to other information required, an affidavit stating that the truck or bus will be used only for the transporting of persons to and from a place of worship, or for other religious work, and that there has been printed on the truck or bus in large letters with the words "Church Bus," with the name of the church or religious organization owning and using the truck or bus, and that during the next twelve (12) months the truck or bus will be used only for the purpose stated.

(7) Any person owning a motor vehicle on which a wrecking crane and other equipment suitable for

an automobile wrecker service has been permanently mounted may register the vehicle and obtain a license for eleven dollars and fifty cents ($11.50) by filing with the county clerk, in addition to other information required, an affidavit that a wrecking crane and other equipment suitable for an automobile wrecker service has been permanently mounted on such vehicle and that during the next twelve (12) months the vehicle will be used only in automobile wrecker service.

(8) Motor vehicles having a declared gross weight in excess of eighteen thousand (18,000) pounds, which when operated in this state are used exclusively for the transportation of property within the limits of the city named in the affidavit hereinafter required to be filed, or within ten (10) miles of the city limits of the city if it is a city of the first, second, third, or fourth class, or within five (5) miles of its limits if it is a city of the fifth or sixth class shall not be required to pay the fee as set out in subsection (3) of this section, and in lieu thereof shall pay forty percent (40%) of the fee set forth in subsection (3) hereof. Nothing in this section shall be construed to limit any right of nonresidents to exemption from registration under any other provisions of the laws granting reciprocity to nonresidents. Operations outside of this state shall not be considered in determining whether or not the foregoing mileage limitations have been observed. When claiming the right to the reduced fee, the applicant's signature on the certificate of registration and ownership shall constitute a certification or affidavit stating that

the motor vehicle when used within this state is used only for the transportation of property within the city to be named in the affidavit and the area above set out and that the vehicle will not be used outside of a city and the area above set out during the current registration period.

(9) Motor vehicles having a declared gross weight in excess of eighteen thousand (18,000) pounds, which are used exclusively for the transportation of coal from the point at which such coal is mined to a railhead or tipple, where such railhead or tipple is located at a point not more than fifty (50) air miles from the point at which such coal is mined, or which are used exclusively for the transportation of primary forest products from the harvest area to a mill or other processing facility, where such mill or processing facility is located at a point not more than fifty (50) air miles from the harvest area or which are used exclusively for the transportation of concrete blocks or ready mixed concrete from the point at which such concrete blocks or ready mixed concrete is produced to a construction site where such concrete blocks or ready mixed concrete is to be used, where such construction site is located at a point not more than thirty (30) air miles from the point at which such concrete blocks or ready mixed concrete is produced shall not be required to pay the fee as set out in subsection (3) of this section, and in lieu thereof shall pay forty percent (40%) of the fee set out in the subsection (3) hereof. The applicant's signature upon the certificate of registration and ownership shall constitute a certification that the motor vehicle will not be used during the current registration period in any manner other than that

for which the reduced fee is provided in this section.

(10) Motor vehicles used exclusively for the transportation and delivery of motor vehicles, not including trailers and semitrailers, by means of the full amount of truckaway methods on trailers or semitrailers, shall pay an amount equal to three fourths (¾) of the fee set out in subsection (3) hereof. Any applicant for such registration shall present to the county clerk a certification from the department that the vehicle may be licensed in accordance herewith. No clerk shall issue registrations under this section without attaching a copy of the bureau's certification to the department of transportation copy of the certificate of registration and ownership.

(11) Any owner of a commercial vehicle registered for a declared gross weight in excess of eighteen thousand (18,000) pounds, intending a transfer same and desiring to take advantage of the refund provisions of KRS 186.056(2) may reregister such vehicle and obtain a "For Sale" certificate of registration and ownership for one dollar ($1.00). Title to a vehicle so registered may be transferred, but such registration shall not authorize the operation or use of the vehicle on any public highway. No refund may be made under the provisions of KRS 186.056(2) until such time as the title to such vehicle has been transferred to the purchaser thereof. Provided, however, that nothing herein shall be so construed as to prevent the seller of a commercial vehicle from transferring the registration of such vehicle to any purchaser thereof.

(12) The annual registration fee for self-propelled vehicles containing sleeping or eating facilities shall be twenty dollars ($20.00) and the tag issued shall be designated "Housecar." Provided, however, that the foregoing shall not include any motor vehicle primarily designed for commercial or farm use having temporarily attached thereto any such sleeping or eating facilities, or any commercial vehicle having sleeping facilities.

(13) The registration fee on any vehicle registered under this section shall be increased under this section shall be increased fifty percent (50%) when such vehicle is not equipped wholly with pneumatic tires.

(14) (a) The bureau of vehicle regulation is authorized to negotiate and execute an agreement or agreements with other jurisdictions for the purpose of developing and instituting proportional registration of motor vehicles engaged in interstate commerce, or in a combination of interstate and intrastate commerce, and operating into, through or within the Commonwealth of Kentucky. The agreeement or agreements may be made on a basis commensurate with, and determined by, the miles traveled on, and use made of, the highways of the Commonwealth as compared with the miles traveled on and use made of highways of other states, or upon any other equitable basis or proportional registration. Notwithstanding the provisions of KRS 186.020, the department shall promulgate regulations concerning the registration of motor vehicles under any agreement or agreements made under this section and shall provide for direct issuance by it

of evidence of payment of any registration fee required under such agreement or agreements. Any proportional registration fee required to be collected under any proportional registration agreement or agreements shall be in accordance with the taxes established in this section.

(b) Any owner of a commercial vehicle who is required to title his motor vehicle under this section shall first title such vehicle with the county clerk pursuant to KRS 186.020 for a state fee of one dollar ($1.00). Title to such vehicle may be transferred, however title without proper registration, shall not authorize the operation or use of the vehicle on any public highway. Any commercial vehicle properly titled in Kentucky may also be registered in Kentucky, and, upon payment of the required fees, the bureau may issue an apportioned registration plate to such commercial vehicle.

(c) Any commercial vehicle that is properly titled in a foreign jurisdiction, which vehicle is subject to apportioned registration as provided in paragraph (a) of this subsection, may be registered in Kentucky, and upon proof of proper title, and payment of the required fees, the bureau may issue an apportioned registration plate to such commercial vehicle. The bureau shall promulgate regulations in accordance with this section.

KRS § 186.140:

KRS 186.140. Reciprocity for nonresidents.

Except as provided in KRS 281.835 and 281.836, a nonresident owner, from a state not requiring registration of nonresidents temporarily in it, who has complied with the laws of the state of his residence relating to registration of motor vehicles, and who displays the requisite plates and holds the requisite receipt or certificate of registration as required by his resident state, shall be exempt from registration in this state for the same period of time as is granted to nonresident owners by the laws and regulations of his state. Registration in any other state shall not relieve any owner resident in this state from the penalties provided in KRS 186.990.

KRS § 186.145:

KRS 186.145. Registration of nonresident by use of copy of registration or title document. —

Any motor vehicle properly registered and titled in another state belonging to a nonresident, which vehicle is required to be registered in this state by reason of lack of reciprocal agreement with the state in which it is registered, or by reason of not qualifying for reciprocity under an existing reciprocal agreement with the state in which it is registered, may be registered with the county clerk by presenting a photostat or certified copy of the registration receipt or certificate of title issued to the nonresident in his home state. The registration receipt issued by the county clerk shall be stamped across its face with a notation prescribed by the department that will indicate

the registration receipt so issued cannot be used in transferring legal title to the motor vehicle. However, under regulations prescribed by the department, a registration receipt so issued may be transferred to a new owner if the foreign legal title and registration is transferred in that state to the new owner. Nothing contained in this section shall release the owner of the vehicle from any tax fees or other requirements imposed by law.

KRS § 281.011:

KRS 281.011 Definitions.

As used in this chapter, unless the context requires otherwise:

(1) The term "carrier" or "motor carrier" means any person who owns, controls, operates, manages, or leases, except persons leasing to authorized carriers, any motor vehicle for the transportation of persons or property for hire upon any highway, and any person who engages in the business of U-Drive-It. It shall include common and contract carriers by motor vehicle, city and suburban buses, holders of nonprofit bus certificates, driveaways and U-Drive-Its;

(2) The term "motor vehicle" means any motor propelled vehicle used for the transportation of persons or property on a public highway, including any such vehicle operated as a unit in combination with other vehicles, and including vehicles propelled by electric power obtained from overhead wires whether operating over rails or otherwise.

(3) The term "common carrier" means any person who holds himself out to the general public to engage in the transportation by motor vehicle of persons or property in intrastate or interstate commerce over regular routes, except that persons holding irregular route common carrier authority granted by the interstate commerce commission, taxicabs, and local cartage vehicles are not required to move over regular routes, and except that the holder of a nonprofit bus certificate shall not be construed to be a common carrier;

(4) The term "irregular route common carrier" means any person who holds himself out to the general public to engage in the transportation by motor vehicle over irregular routes of specific commodities which have been, or will be, designated by the bureau as exempted commodities, including specific commodities removed from the exempted commodity list by the bureau where the right to engage in the transportation of same has been properly grandfathered into the appropriate authority under the applicable statutes;

(5) The term "contract carrier" means any person who, under individual contracts or agreements, engages in the transportation, other than transportation referred to in subsections (3) and (4) of this section by motor vehicle of passengers or property in interstate or intrastate commerce.

(6) The term "driver" or "chauffeur" means the person physically operating the motor vehicle;

(7) The term "regular seat" means a seat ordinarily and customarily used by one passenger

and in determining such seating capacity the manufacturer's rating may be considered.

KRS § 281.014:

KRS 281.014 Definitions.

As used in this chapter, unless the context requires otherwise:

(1) (a) The term "taxicab certificate" means a certificate granting authority only for the operation of a given number of motor vehicles transporting passengers for hire, the principal operation of which is confined to the corporate limits of one city and its suburban area, and not operating over any regular route, and the destination of which motor vehicles are designated by the passengers at the time of such transportation;

(b) A "taxicab" is a motor vehicle operated under one or more taxicab certificates, and is a vehicle designed or constructed to transport not more than fifteen (15) passengers exclusive of the driver;

(c) The term "taxicab license" means a license plate issued to a taxicab authorized to operate under a taxicab certificate;

(2) (a) An "airport limousine certificate" means a certificate granting authority only for the operation of motor vehicles exclusively transporting passengers or baggage for hire over regular routes between points within a city or its suburban area and an airport;

(b) An "airport limousine" is a motor vehicle operated under one or more airport limousine certificates;

(c) The term "airport limousine license" means a license plate issued for a motor vehicle authorizing its operation under one or more airport limousine certificates;

(3) (a) The term "local cartage certificate" means a certificate granting authority only for the operation of motor vehicles exclusively engaged in the transportation of property for hire between points within a city or withi a city and its commercial area;

(b) A "local cartage vehicle" is a motor vehicle operated under a local cartage certificate;

(4) The term "U-drive-it" means any person who leases or rents a motor vehicle for. a consideration to be used for the transportation of persons or property, but for which no driver is furnished, and the use of which motor vehicle is not for the transportation of persons or property for hire by the lessee or rentee;

(5) The term "driveaway" means the transporting and delivering of motor vehicles, except semi-trailers, and trailers, whether destined to be used in either a private or for-hire capacity, under their own power or by means of a full mount method, saddle mount method, the tow bar method or any combination of them over the highways of this state from any point of origin to any point of destination for-hire. The transportation of such vehicles by the full mount method on trailers or semi-trailers shall not be included in the term.

KRS § 281.610

KRS 281.610 Regulation of interstate commerce.

(1) The provisions of this chapter shall apply to interstate commerce, except insofar as such application is in conflict with any provision of the Constitution of the United States or the acts of congress.

(2) The commissioner may grant a certificate of convenience and necessity for the transportation of persons or property for compensation in interstate commerce, and may regulate such interstate commerce under the authority of and in accordance with the provisions of any act of congress vesting in or delegating to the commissioner such authority as an agency of the United States government. The commissioner may notify the proper department of the federal government of his assent to the requirements and conditions of such act of congress in regard to interstate commerce by motor vehicle.

KRS § 281.615:

KRS 281.615 Permit for motor carrier required; employment illegal, when

(1) No person shall act as a motor carrier without first having obtained a certificate or permit, as the case may be, from the bureau.

(2) No person shall knowingly employ the services of a motor carrier not authorized to perform such services.

ORC § 4503.02:

ORC 4503.02 Levy of annual license tax; use.

An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways, for the purpose of enforcing and paying the expense of administering the law relative to the registration and operation of such vehicles, planning, constructing, maintaining, and repairing public roads, highways, and streets, maintaining and repairing bridges and viaducts, paying the counties' proportion of the cost and expenses of cooperating with the department of transportation in the planning, improvement, and construction of state highways, paying the counties' portion of the compensation, damages, cost, and expenses of planning, constructing, reconstructing, improving, maintaining, and repairing roads, for the purpose of enforcing and paying the expenses of administering the law to provide reimbursement for hospitals on account of the expenses for the care of indigent persons injured in motor vehicle accidents, and enabling municipal corporations to plan, construct, reconstruct, repave, widen, maintain, repair, clear, and clean public highways, roads, and streets; to maintain and repair bridges and viaducts; to purchase, erect, and maintain street and traffic signs and markers; to purchase, erect, and maintain traffic lights and signals; and to supplement revenue already available for such purposes, to pay the interest, principal, and charges on bonds and other obligations issued pursuant to Section 2g of Article VIII, Ohio Constitution and sections 5528.10 and 5528.11 of the Revised Code, and to pay the interest, principal, and charges on highway obligation issued pursuant to Section 2i of Article VIII, Ohio Constitu-

tion and sections 5528.30 and 5528.31 of the Revised Code. Such tax shall be at the rates specified in section 4503.04 of the Revised Code and shall be paid to and collected by the registrar of motor vehicles or deputy registrar at the time of making application for registration.

ORC § 4503.04:

ORC 4503.04 Schedule of rates.

The rates of the taxes imposed by section 4503.02 of the Revised Code shall be as follows:

(A) For each motor vehicle of three wheels or less, including a motorized bicycle but excluding a motor bicycle, ten dollars;

(B) For each passenger car, twenty dollars;

(C) For each house trailer and each travel trailer, ten dollars;

(D) For each noncommercial motor vehicle and motor home, thirty-five dollars;

(E) For each commercial car and for each trailer or semitrailer, except a manufactured home or noncommercial trailer, which shall not be taxed by this division of this section, the license tax is fifteen dollars plus:

(1) Eighty-five cents for each one hundred pounds or part thereof for the first two thousand pounds or part thereof of weight of vehicle fully equipped;

(2) One dollar and forty cents for each one hundred pounds or part thereof in excess of two thousand pounds up to and including three thousand pounds;

(3) One dollar and ninety cents for each one hundred pounds or part thereof in excess of three thousand pounds up to and including four thousand pounds;

(4) Two dollars and twenty cents for each one hundred pounds or part thereof in excess of four thousand pounds up to and including five thousand pounds;

(5) Two dollars and forty cents for each one hundred pounds or part thereof in excess of five thousand pounds up to and including six thousand pounds;

(6) Two dollars and eighty cents for each one hundred pounds or part thereof in excess of six thousand pounds up to and including ten thousand pounds;

(7) Three dollars for each one hundred pounds or part thereof in excess of ten thousand pounds up to and including twelve thousand pounds;

(8) Three dollars and twenty-five cents for each one hundred pounds or part thereof in excess of twelve thousand pounds.

(F) For each noncommercial trailer, the license tax is:

(1) Eighty-five cents for each one hundred pounds or part thereof for the first two thousand pounds or part thereof of weight of vehicle fully equipped;

(2) One dollar and forty cents for each one hundred pounds or part thereof in excess of two thousand pounds up to and including three thousand pounds.

(G) Notwithsanding its weight, twelve dollars for any:

(1) Vehicle equipped, owned, and used by a charitable or nonprofit corporation exclusively for the purpose of administering chest x-rays or receiving blood donations;

(2) Van used principally for the transportation of handicapped persons that has been modified by being equipped with adaptive equipment to facilitate the movement of such persons into and out of the van.

(H) For each bus, except a transit bus, having motor power the license tax is:

(1) Eighty-five cents per one hundred pounds or part thereof for the first two thousand pounds or part thereof of weight of vehicle fully equipped;

(2) One dollar and thirty cents for each one hundred pounds or part thereof in excess of two thousand pounds up to and including three thousand pounds;

(3) One dollar and eighty cents for each one hundred pounds or part thereof in excess of three thousand pounds up to and including four thousand pounds;

(4) Two dollars and ten cents for each one hundred pounds or part thereof in excess of four thousand pounds up to and including six thousand pounds;

(5) Two dollars and forty cents for each one hundred pounds or part thereof in excess of six thousand pounds up to and including ten thousand pounds;

(6) Two dollars and seventy cents for each one hundred pounds or part thereof in excess of ten thousand pounds;

(7) Notwithstanding its weight, twelve dollars for any bus used principally for the

transportation of handicapped persons or persons sixty-five years of age or older;

(8) Notwithstanding its weight, twenty dollars for any bus used principally for the transportation of persons in a ridesharing arrangement.

(I) For each transit bus having motor power the license tax is twelve dollars.

"Transit bus" means either a motor vehicle having a seating capacity of more than seven persons which is operated and used by any person in the rendition of a public mass transportation service primarily in an municipal corporation or municipal corporations and provided at least seventy-five per cent of the annual mileage of such service and use is within such municipal corporation or municipal corporations or a motor vehicle having a seating capacity of more than seven persons which is operated solely for the transportation of persons associated with a charitable or nonprofit corporation, but does not mean any motor vehicle having a seating capacity of more than seven persons when such vehicle is used in a ridesharing capacity.

The application for registration of such transit bus shall be accompanied by an affidavit prescribed by the registrar of motor vehicles and signed by the person or an agent of the firm or corporation operating such bus stating that the bus has a seating capacity of more than seven persons, and that it is either to be operated and used in the rendition of a public mass transportation service and that at least seventy-five per cent of the annual mileage of such operation and use shall

be within one or more municipal corporations or that it is to be operated solely for the transportation of persons associated with charitable or nonprofit corporation.

The form of the license plate, and the manner of its attachment to the vehicle, shall be prescribed by the registrar of motor vehicles.

(J) The minimum tax for any vehicle having motor power other than a farm truck, a motor bicycle, or motorcycle is ten dollars and eighty cents, and for each noncommercial trailer, five dollars.

(K) For each farm truck, except a noncommercial motor vehicle, which is owned, controlled, or operated by one or more farmers exclusively in farm use as defined in this section, and not for commercial purposes, and provided that at least seventy-five per cent of such farm use is by or for the one or more owners, controllers, or operators of the farm in the operation of which a farm truck is used, the license tax is five dollars plus:

(1) Fifty cents per one hundred pounds or part thereof for the first three thousand pounds;

(2) Seventy cents per one hundred pounds or part thereof in excess of three thousand pounds up to and including four thousand pounds;

(3) Ninety cents per one hundred or part thereof in excess of four thousand pounds up to and including six thousand pounds;

(4) Two dollars for each one hundred pounds or part thereof in excess of six thousand pounds up to and including ten thousand pounds;

(5) Two dollars and twenty-five cents for each one hundred pounds or part thereof in excess of ten-thousand pounds;

(6) The minimum license tax for any farm truck shall be twelve dollars.

"Farm truck" means a truck or bus used in the transportation from the farm of products of the farm, including livestock and its products, poultry and its products, floricultural and horticultural products, and in the transportation to the farm of supplies for the farm, including tile, fence, and every other thing or commodity used in agricultural, floricultural, horticultural, livestock, and poultry production, and livestock, poultry, and other animals and things used for breeding, feeding, or other purposes connected with the operation of the farm or for the transportation of agricultural employees and used only in the transportation of such employees as are necessary in the operation of the farm. Such bus license plates shall be issued for a period of ninety days from the date of issue, for a fee of ten dollars, provided, such plate shall not be issued for more than two ninety-day periods, in any calendar year. Such use does not include the operation of trucks by commercial processors of agricultural products.

"Farm supplies" includes fuel used exclusively in the operation of a farm, including one or more homes located on and used in the operation of one or more farms, and furniture and other things used in and around such homes.

License plates for farm trucks shall have some distinguishing marks, letters, colors, or other characteristics to be determined by the director of highway safety.

Every such licensee shall furnish an affidavit certifying that the truck licensed to him is to be

so used as to meet the requirements necessary for the farm truck classification.

Any farmer may use his truck for commercial purposes by paying the difference between the commercial truck registration fee and the farm truck registration fee for the remaining part of the registration period for which the truck is registered. Such remainder shall be calculated from the beginning of the semiannual period in which application for such commercial license is made.

Taxes at the rates provided in this section are in lieu of all taxes on or with respect to the ownership of such motor vehicles, except as provided in section 4503.06 of the Revised Code.

(L) For each truck which is owned, controlled, or operated by a nonresident, and licensed in another state, and which is used exclusively for the transportation of nonprocessed agricultural products intrastate, from the place of production to the place of processing, the license tax is twenty-four dollars.

"Truck," as used in this division, means any pickup truck, straight truck, semitrailer, or trailer other than a travel trailer. Nonprocessed agricultural products, as used in this division, does not include livestock or grain.

Such license shall be issued for a period of one hundred thirty days in the same manner in which all other licenses are issued under this section, provided, that no truck shall be so licensed for more than one hundred thirty-day period during any calendar year.

The license issued pursuant to this division shall consist of a windshield decal to be designed by the director of highway safety.

Every licensee shall furnish an affidavit certifying that the truck licensed to him is to be used exclusively for the purposes specified In this division.

(M) Every licensee registering a motor vehicle as a noncommercial motor vehicle as defined in section 4501.01 of the Revised Code, or registering a trailer as a noncommercial trailer as defined in that section, shall furnish an affidavit certifying that the motor vehicle or trailer so licensed to him is to be so used as to meet the requirements necessary for the noncommital vehicle classification.

(N) Every person registering a van or bus as provided in division (G)(2) and (H)(7) of this section shall furnish a notarized statement certifying that the van or bus licensed to him is to be used for the purposes specified in those divisions. The form of the license plate issued for such motor vehicles shall be prescribed by the registrar.

(O) Every person registering as a passenger car a motor vehicle designed and used for carrying more than nine but not more than fifteen passengers, and every person registering a bus as provided in division (H)(8) of this section, shall furnish an affidavit certifying that the vehicle so licensed to him is to be used in a ridesharing arrangement and that he will have in effect whenever the vehicle is used in a ridesharing arrangement a policy of liability insurance with respect to the motor vehicle in amounts and coverages no less than those required by section 4509.79 of the Revised Code. The form of the license plate issued for such a motor vehicle shall be prescribed by the registrar.

(P) As used in this section:

(1) "Van" means any motor vehicle having a single rear axle and an enclosed body without a second seat.

(2) "Handicapped person" means any person who has lost the use of one or both legs, or one or both arms, or is blind, deaf, or so severely disabled as to be unable to move about without the aid of crutches or a wheelchair.

ORC § 4503.10:

ORC 4503.10 Application for registration; transmission of license fees.

(A) Every owner of a motor vehicle and every person mentioned as owner in the last certificate of title, bill of sale, or sworn statement of ownership of a motor vehicles which is operated or driven upon the public roads or highways shall cause to be filed each year, by mail or otherwise, in the office of the registrar of motor vehicles or a deputy registrar, a written application, the form of which is to be prescribed by the registrar, for registration for the following registration year, which shall begin on the first day of January of every calendar year and end on the thirty-first day of December in the same year. Applications for registration shall be filed at the times established by the registrar pursuant to section 4503.101 [4503.10.1] of the Revised Code, or as provided in section 4503.102 [4503.10.2] of the Revised Code, and shall be made on blanks furnished by the registrar for that purpose, containing the following information:

(1) A brief description of the motor vehicle to be registered, including the name of the manufacturer, the factory number of such vehicle, the year's model, the amount of motive power in figures of horsepower, according to the formula prescribed in section 4503.08 of the Revised Code, and, in case of commercial cars, the gross weight of vehicle fully equipped computed according to the formula prescribed in said section;

(2) The name, residence, and business addresses of the owner, and the township and municipal corporation in which such owner resides:

(3) The district of registration, which shall be determined as follows:

(a) In case the motor vehicle to be registered is used for hire or principally in connection with any established business or branch business, conducted at a particular place, the district of registration is the municipal corporation in which such place is located, or, if not located in any municipal corporation, the county and township in which such place is located.

(b) In case such vehicle is not so used, the district of registration is the municipal corporation or county in which the owner resides at the time of making the application.

(4) Whether such motor vehicle is a new or used motor vehicle;

(5) Date of purchase of such motor vehicle;

(6) Whether the fees required to be paid for the registration or transfer of the motor vehicle, during the preceding period of the current registration year, have been paid. Each application for registration shall be signed by the owner.

(7) The owner's social security account number, if assigned, or, where a motor vehicle to be principally in connection with any established business, the owner's federal taxpayer identification number.

(B) At the time of making such application, the applicant shall present for inspection bills of sale or sworn statement of ownership, the originals of which have been filed with the clerk of the court of common pleas, or a certificate of the clerk certifying that such bills of sale or sworn statement of ownership have been filed with such clerk, or a certificate of title or a memorandum certificate showing title to the motor vehicle to be registered in such applicant [application]. If such application is not in proper form, or if proper bills of sale or sworn statement of ownership or property certificate thereof or certificate of title or memorandum certificate does not accompany the application, or if all registration and transfer fees for such motor vehicle, for the preceding year or the preceding period of the current registration year, have not been paid, the license shall be refused. This section does not required the payment of license or registration taxes on a motor vehicle for any preceding year, or for any preceding period of a year, if such motor vehicle was not taxable for such preceding year or period under sections 4503.02, 4503.04, 4503.11, 4053.12, 4503.16, 4504.02, and 4504.06 of the Revised Code. When a certificate of registration is issued, the official issuing the same shall indicate such issuance with a stamp on the certificate of title or memorandum certificate.

(C) In addition, a charge of fifty cents shall be made for each set of reflectorized safety license plates, and a charge of twenty-five cents shall be made for each set of county identification stickers, to cover the cost of producing the license plates and stickers, including material, manufacturing, and administrative costs. Such fees shall be in addition to the license tax. If the total cost of producing such plates is less than fifty cents per set, or if the total cost of producing such stickers is less than twenty-five cents per set, any excess moneys accruing from the fifty-cent and twenty-five cent charge shall be distributed by the treasurer of state in the same manner as provided by section 4501.04 of the Revised Code for the distribution of license tax moneys. If the total costs of producing such plates exceeds fifty cents per set, or if the total cost of producing such stickers exceeds twenty-five cents per set, the difference shall be paid from the license tax moneys collected pursuant to section 4503.02 of the Revised Code.

(D) Each deputy registrar shall be allowed a fee of one dollar and fifty cents, for each application received by him, which shall be addition to the license fee and shall be for the purpose of compensating the deputy registrar for his services and the other employees, and such office and rental expenses, as may be necessary for the proper discharge of his duties in the receiving of applications and the issuing of licenses.

(E) Upon the certification of the registrar the county sheriff or local police officials shall recover license plates erroneously or fraudulently issued.

(F) Each deputy shall, upon receipt of any application for registration, together with the license fee and any county motor vehicle license tax or municipal motor vehicle license tax levied pursuant to Chapter 4504. of the Revised Code, transmit such fee and tax, if any, in the manner provided in this section together with the original and duplicate copy of the application to the registrar. The registrar, subject to the approval of the director of highway safety, may deposit the funds collected by such deputies in a local bank or depository to the credit of the "state of Ohio, department of highway safety." Where such local bank or depository has been designated by the registrar, each deputy shall deposit all funds collected by him in such bank or depository not more than one business day after such collection, and shall make reports to the registrar of the amounts so deposited, together with such other information, some of which may be prescribed by the auditor of state, as the registrar may require and as prescribed by the registrar by rule. The registrar shall, within three days after receipt of notification of the deposit of fund by a deputy in a local bank or depository, draw on such account in favor of the treasurer of state. The registrar, subject to the approval of the director and the auditor of state, may make reasonable rules necessary for the prompt transmittal of fees and for safeguarding the interest of the state and of counties and municipal corporations levying county motor vehicle license taxes or municipal motor vehicle license taxes. The registrar may pay service charges usually collected by banks and depositories for such service. In case deputies

are located in communities where banking facilities are not available, they shall transmit such fees forthwith, by money order or otherwise, as the registrar may, by regulation, approved by the director and the auditor of state, prescribe, and the registrar may pay the usual and customary fees for such service.

(G) This section does not prevent any person from making an application for a motor vehicle license directly to the registrar upon payment of a one dollar and fifty cents service fee for each application. Each deputy shall retain in his office a copy of each application received by him for a period of three registration years. This copy shall be for public examination, but no person may make copies thereof for sale or distribution.

ORC § 4503.37:

(A) A certificate of reciprocity issued under this section shall exempt the owner and the driver of every motor vehicle which is duly registered in the state, district, country, or sovereignty other than this state, to which the certificate is granted, from the laws of this state pertaining to registration and licensing and the penal statutes relating thereto, provided such owner or driver has complied with the law in regard to motor vehicles in the state, district, country, or sovereignty in which the motor vehicle is registered and complies with such law while operating and driving such motor vehicle upon the public roads of this state. Such certificate shall not, however, exempt such an owner from the requirements of sections 5728.01 to 5728.17, inclusive, and 5728.99 of the

Revised Code, or from the payment of any other taxes which may be imposed on Ohio-owned motor vehicles.

(B) The Ohio reciprocity board shall issue a certificate of reciprocity to each state, district, country, or sovereignty other than this state:

(1) Which state, district, country or sovereignty grants to the owners and drivers of Ohio-registered motor vehicles the same exemptions granted by a certificate of reciprocity to owners and drivers of motor vehicles not registered in Ohio;

(2) And in which state, district, country, or sovereignty, except for nominal charges for registration for identification purposes, all highway taxes, including use taxes, motor vehicle fuel taxes, flat fees, and public utility taxes, are levied impartially on all motor vehicles regardless of where the motor vehicles have been registered.

(C) The Ohio reciprocity board shall not issue a reciprocity certificate, and shall cancel any such certificate previously issued, if the state, district, country, or sovereignty concerned does not comply with divisions (B)(1) and (B)(2) of this section, or charges registration flat fees of owners of Ohio-registered motor vehicles which fees are in no way governed by motor vehicle fuel consumption, or miles traveled, in said state, district, country, or sovereignty.

(D) Taxes and assessments levied impartially and collected directly on a per mile basis, or per gallon of motor vehicle fuel basis, shall not be con-

strued to disqualify the state, district, country, or sovereignty levying the same from receiving a certificate of reciprocity; however, if a tax or assessment, or note on similar vehicles registered in other jurisdictions, the board may refuse to grant a certificate of reciprocity, and if such a certificate has been previously granted, may cancel said certificate.

(E) The reciprocity board shall issue reciprocity certificates to each of the United States and the District of Columbia and shall not cancel any such certificate for a period of six months from the effective date of this section. The reciprocity board may, at the expiration of the six-month period immediately succeeding such date extend, where it is satisfied that a state, district, country, or sovereignty has not complied with, but is reasonably attempting to comply with divisions (B)(1) and (B)(2) of this section, the certificate of reciprocity for additional periods of time not to exceed six months each, notwithstanding division (C) of this section.

103 KAR § 44:020(6)(b):

Fleets of vehicles operating under a U-Drive-It permit which are registered pursuant to an allocation formula by the Department of Transportation may, upon approval of the Department of Revenue, elect to pay the five per cent (5%) usage tax on revenue derived from rental or leasing of all motor vehicles rented or leased in Kentucky.

* * * * * * *

CERTIFICATE OF SERVICE

This is to certify that the foregoing Jurisdictional Statement was served this 4 day of April, 1986, in compliance with Rule 12 and 28 of the Supreme Court of the United States, by depositing three copies of same in a United States post office or mailbox, with first-class postage prepaid, addressed to the following: Hon. Ross T. Carter, Legal Services Section, Revenue Cabinet, P.O. Box 423, Frankfort, KY 40602 and Hon. David L. Armstrong, Attorney General, Office of the Attorney General, 116 Capitol Building, Frankfort, Kentucky 40601. All parties required to be served have been served.

Robert S. Miller

(2)

No. 85-1637

Supreme Court, U.S.
FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1985

BUDGET RENT A CAR OF CINCINNATI, INC. - - - - - - - - - - Appellant

versus

REVENUE CABINET, COMMONWEALTH OF KENTUCKY - - - - - - Appellee

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MOTION TO DISMISS OR AFFIRM

On Appeal From the Supreme Court of Kentucky

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17 MP

No. 85-1637

SUPREME COURT OF THE UNITED STATES

October Term, 1985

BUDGET RENT A CAR OF CINCINNATI, INC. - *Appellant*

v.

REVENUE CABINET, COMMONWEALTH OF KENTUCKY - - - - - - - *Appellee*

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Kentucky on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I. THE STATE LAWS INVOLVED AND THE NATURE OF THE CASE.

The Greater Cincinnati Airport is located in Northern Kentucky. Budget Rent A Car of Cincinnati maintains an outlet there, renting automobiles to customers who frequently drive across the Ohio River into Cincinnati. Some of the cars which Budget rents were licensed in Kentucky, and some were licensed in Ohio. The question of where the vehicles should have been

registered is not an issue in this case. The questions raised by Budget were: may Budget rent its Ohio-licensed vehicles from its Kentucky outlet without paying tax to Kentucky?; and, is tax due on every Kentucky transaction even though some of the vehicles are driven some of the time in Ohio?

The first question was decided purely under state law. Kentucky imposes a usage tax for the privilege of using Kentucky highways. The Supreme Court of Kentucky looked at the applicable statutes and regulations (Ky. Rev. St. 138.460, 138.463, 138.455, and 103 Ky. Admin. Reg. 44:020) and determined that Kentucky motor vehicle usage tax was due on every transaction that took place in Kentucky, irrespective of whether the vehicle bore Ohio or Kentucky license plates. This question, since it involves only state law, is presumably not before this Court for consideration.

II. THE FEDERAL QUESTION INVOLVED.

The second question was decided by the Kentucky Supreme Court under the commerce clause of the federal constitution. The Court applied the classic four-part test set out in *Complete Auto Transit, Inc. v. Brady,* 430 U. S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977), and concluded that taxation of all of Budget's Kentucky operations imposed no unconstitutional burden on interstate commerce.

Other constitutional arguments, such as a denial of equal protection, were not raised by Budget and have never been discussed in the proceedings below.

III. A BRIEF SUMMARY OF THE KENTUCKY SUPREME COURT'S DECISION.

A. The State Law Issue.

In Kentucky, vehicle rental agencies may select between two methods of paying motor vehicle usage tax. They may pay either five percent of the value of the vehicle at the time it is registered in Kentucky, or they may pay five percent of the gross rental charges derived from renting the vehicle in Kentucky. Budget argued that since registration in Kentucky is a prerequisite to the first alternative, it must also be a prerequisite to the second alternative. The Supreme Court of Kentucky ruled to the contrary. The Court simply stated that if the second alternative is elected, then usage tax is due on all rentals executed within Kentucky, regardless of where the vehicle may have been registered. To hold otherwise would permit Budget to escape tax completely simply by purchasing Ohio license plates for all the vehicles located at the Kentucky outlet. In fact, there was some evidence in the record to indicate that this had indeed occurred.

B. The Federal Constitutional Issue.

The basic tenor of the constitutional argument below was that since interstate commerce is implicated (by virtue of the fact that some customers drive rental vehicles from Kentucky into Ohio and back) then the entire transaction, or a large proportion of the total transactions, must be exempt from taxation. In applying the *Brady, supra,* test the Kentucky Supreme Court

reached these conclusions: the Kentucky motor vehicle usage tax does not discriminate against interstate commerce; maintaining a business outlet for the rental of vehicles in Kentucky supplies sufficient nexus to impose the tax; it is not necessary that the tax be apportioned on the basis of mileage, under the authority of *Capitol Greyhound Lines v. Brice,* 339 U. S. 542, 70 S. Ct. 806, 94 L. Ed. 1053 (1950); and the tax is fairly related to the services provided by the state, viz., the privilege of using Kentucky highways.

IV. ARGUMENT.

A. The Case Presents No Substantial Question Not Previously Decided by This Court.

Complete Auto Transit, supra, supplies the definitive test for determining whether Kentucky's tax is valid under the commerce clause. The appellant does not propose that *Complete Auto Transit* ought to be extended, discarded, or substantially modified. Rather Budget seems to argue either that *Complete Auto Transit* should not be applied at all (see Appellant's jurisdictional statement, pp. 14-15) or that the Kentucky Supreme Court mishandled the apportionment prong of the *Complete Auto Transit* test. (See Appellant's jurisdictional statement, pp. 15-16).

First, it should be clear that *Complete Auto Transit* applies to highway tax cases. The case itself, after all, dealt with a tax levied on a motor carrier. Subsequent cases discussing *Complete Auto Transit* have indicated that it applies to all types of interstate commerce, including use of highways. See *Massachusetts v. United*

States, 435 U. S. 444, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978).

Second, this Court has ruled that a state may ignore mileage completely in evaluating the apportionment prong of the *Complete Auto Transit* test. In *Capitol Greyhound Lines v. Brice, supra,* the Court stated: "Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. [. . .] We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage . . . ." 339 U. S. at 546-547, 94 L. Ed. 2d 1053, 70 S. Ct. 806.

Complete Auto Transit and *Capitol Greyhound Lines* specifically hold that the fact that a taxpayer may travel extensively on out-of-state highways does not invalidate a tax or reduce a tax on his in-state travels. This case illuminates the precise reason for that rule. Paying the Kentucky tax entitles Budget and Budget's customers to use every highway in Kentucky. As it happens they choose to use our highways very little; but they are free, just like every other Kentucky taxpayer, to use every mile of Kentucky's highways. Their privilege is the same as everyone else's; therefore their tax obligation should be the same, too.

B. Budget Attempts to Raise Issues Which Were Not Raised Before and for Which It Lacks Standing.

Budget elected to be taxed under the second alternative. Budget now argues that the *first* alternative is invalid. Budget paints a picture of ravenous tax col-

lectors stationed at the state's borders extracting an onerous tax from every non-resident who desires to drive into our state. That scenario might be appropriate if Budget were one of those hypothetical non-residents who was stopped and forced to pay the tax. But those are not the facts of this case. The pertinent fact here is that Budget rents automobiles in Kentucky to people who sometimes drive into Ohio, and doesn't want to pay tax to either state. Budget should not be permitted to avoid its own tax obligation by arguing that another tax, assessed against another taxpayer, might be unconstitutional.

V. CONCLUSION.

For the reasons stated herein this appeal should either be dismissed or affirmed.

Respectfully submitted,

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Legal Services Section
Revenue Cabinet
P. O. Box 423
Frankfort, Kentucky 40602
Ph: 502/564-3112

Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion to Dismiss or Affirm were served this ____ day of May, 1986, in compliance with the Rules of the Supreme Court of the United States, by depositing three copies in a United States post office or mailbox, with first-class postage prepaid, addressed to Hon. Robert S. Miller, Miller, Griffin & Marks, P.S.C., Suite 700, Security Trust Building, Lexington, Kentucky 40507-1293. All parties required to be served have been served.

Ross T. Carter
Attorney for Appellee

APPENDIX

RENDERED: JANUARY 16, 1986
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 84-SC-991-DG

REVENUE CABINET, COMMONWEALTH OF KENTUCKY - - - - - - - *Movant*

v.

BUDGET RENT-A-CAR OF CINCINNATI, INC. - - - - - - - - - *Respondent*

On Review From the Court of Appeals
No. 84-CA-707-MR
(Franklin Circuit Court No. 82-CI-1017)

OPINION OF THE COURT BY JUSTICE GANT REVERSING AND REMANDING

Budget Rent-A-Car of Cincinnati, Inc., among its operations, maintains an automobile rental outlet at Greater Cincinnati Airport, which is located in Boone County, Kentucky. Rentals at that site comprise some 60% of the total business of the corporation. Pursuant to the applicable statutes and regulations of this state, an allocation formula was devised and agreed to by which Budget registered some 19% of the vehicles used at this location in Kentucky, the remainder being registered in Ohio. This action concerns the usage tax payable to the Commonwealth under the applicable law of the state.

The statute pertaining to the question is:

KRS 138.463. Collection of tax on U-Drive-It. — (1) A holder of a certificate as required under KRS 281.615 to operate as a U-Drive-It as defined in KRS 281.014 may pay the usage tax as provided in KRS 138.460 or, subject to the provisions of subsection (2), may pay a usage tax of five per cent (5%) levied upon the amount of the gross rental or lease charges paid by a customer or lessee renting or leasing a motor vehicle from such holder of the certificate.

(2) A holder of a certificate shall pay the usage tax as provided in KRS 138.460 unless he shows to the satisfaction of the Cabinet that he is regularly engaged in the renting or leasing of motor vehicles to retail customers as part of an established business. Persons first engaging in the renting or leasing of motor vehicles to retail customers shall, in addition to obtaining a certificate required under KRS 281.615, demonstrate to the satisfaction of the Cabinet that they are prepared to qualify under the standards set forth in this subsection.

(3) In the event the holder of such certificate qualifies under subsection (2) and elects to pay the usage tax by the alternate method as provided in subsection (1), he shall present his certificate to the county clerk at the time the motor vehicle is offered for registration in Kentucky and the following provisions shall be applicable.

(4) The tax shall be the direct obligation of the holder of the certificate but it may be charged to and collected from the customer in addition to the rental or lease charges. The tax due shall be remitted to the Revenue Cabinet.

The applicable regulation in this case is 103 KAR 44: 020(6)(b):

> Fleets of vehicles operating under a U-Drive-It permit which are registered pursuant to an allocation formula by the Department of Transportation may, upon approval of the Department of Revenue, elect to pay the five per cent (5%) usage tax on revenue derived from rental or leasing of all vehicles rented or leased in Kentucky.

Under KRS 138.463(1), Budget chose to operate under this second option, which provides a usage tax of 5% upon "gross rental or lease charges paid by a customer or lessee," rather than paying the usage tax on the vehicles registered in Kentucky. However, they paid this optional tax only on the rental or lease charges on those vehicles registered in Kentucky, and not on the rental or lease charges for the entire fleet of U-Drive-Its rented at the Kentucky location. Relying upon the above quoted regulation and statute, and after a complete audit of Budget, Revenue assessed a deficiency of $255,526, plus penalties and interest, contending the regulation and the statute clearly required under the option selected by Budget that the 5% usage tax applied to all Kentucky rentals, not merely to rentals of those vehicles registered in the state.

The audit conducted by Revenue on the records of Budget disclosed that Budget had collected the 5% usage tax on all vehicles in the rental fleet, irrespective of its registration, applying the tax to the "time and mileage" charge and the collision insurance charge, but not to other charges such as the "drop-off" charge in the rental contracts. However, Budget had paid the tax thus collected on only the vehicles registered in Kentucky, pocketing the remainder.

The Board of Tax Appeals upheld the deficiency assessment, plus penalty and interest, but its Opinion and Order, written by Edward F. Prichard, Jr., Chairman, was reversed by the Franklin Circuit Court and that reversal was upheld by the Court of Appeals.

STATUTORY CONSTRUCTION

KRS 138.463 provides two alternate methods of paying taxes for U-Drive-It businesses operating in Kentucky. They may pay the usage tax of 5% provided under KRS 138.460 on the value of registered vehicles at the time of registration; or, they may pay a usage tax of 5% on the "gross rental or lease charges paid by a customer or lessee renting or leasing *a* motor vehicle . . ." There is no language of limitation if the company elects to pay its tax under the second alternative and yet the interpretation urged upon us and adopted by Budget (and by the Court of Appeals) would add to the second alternative, after the words "motor vehicle," the phrase "Registered in Kentucky." We cannot concur with such equivocation, and find no connection in the statute between the two alternatives which would make the first alternative an incidence of the second. *Cf. Furste v. Dixie Traction Company,* 286 Ky. 336, 150 S. W. 2d 913 (1941).

The alternative methods are quite simple. Once the allocation formula is determined, as provided by 103 KAR 44:020, the U-Drive-It operator may pay the usage tax provided by KRS 138.460 at the time of registration, on all vehicles registered in Kentucky, and exclude those vehicles registered in another state; or they may elect to pay the 5% usage tax derived from leases entered into in this state on *all* vehicles in the rental fleet which are leased in Kentucky.

To hold otherwise would permit Budget to select the best of both alternatives. For example, the record divulges

that there was annually a vast difference between the percentage of vehicles registered in Kentucky and the percentage of rental of those vehicles when compared to the entire fleet rental. Also, for two periods, one of four months and one of five months, no tax was paid at all inasmuch as no Kentucky vehicle was rented out of the entire fleet. Clearly, the statute was not intended to permit Budget, or similar enterprises, to do business in this state on a regular basis without paying a fair and proper tax for that privilege. *Cf. Reeves v. Deisenroth,* 288 Ky. 724, 157 S. W. 2d 331 (1941). Further, KRS 138.455 states that all taxes imposed under the applicable sections of the chapter are taxes "on the privilege of using a motor vehicle upon the public highways" of this state. Under our Constitution, the revenues from such taxes are mandated to be placed in the road fund.

CONSTITUTIONALITY

The principal thrust of Budget's argument herein is that the regulatory scheme enacted by Revenue under the statute and under the applicable regulations are violative of the United States Constitution, art. 1, § 8, CL. 3, the interstate commerce clause. Budget's contention was adopted by the Franklin Circuit Court and the Court of Appeals, but we do not agree. Although the law relating to the commerce clause has undergone cyclical changes over the past 50 years, one phrase has been repeatedly echoed in the halls of the Supreme Court of the United States. That phrase is: "It is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250, 254, 58 S. Ct. 546, 548, 82 L. Ed. 823 (1938).

The criteria which are to be applied to any state tax relating to interstate commerce, by whatever name such tax may be levied, were set out in *Complete Auto Transit, Inc. v. Brady,* 430 U. S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). Those are: (1) There shall not be discrimination between foreign and state corporations; (2) There must be local activities within the taxing state to form sufficient nexus to justify the tax; (3) The tax must be properly apportioned to local activities; and (4) The tax must be related fairly to services provided by the state. Also, this case goes on to say, such tax would be upheld even though the activity was generated exclusively by interstate sales.

Applying these criteria to the case before us, we find distinct compliance with each of them. First, there is no discrimination between this Ohio corporation and any Kentucky corporation operating in the same line of business. In fact, no discrimination is even urged by the respondent. Second, the entire activities of Budget in renting its fleet at its airport location in Kentucky are intrastate, not interstate, giving more than sufficient connection, or nexus, to this state in the operation. The fact that the customer, or lessee, may go north, south, east or west from his point of Kentucky origin is his choice, not that of Budget. Also, in whichever direction he goes, he operates upon the highways of this state for some portion of the trip. This is a total answer to the third standard. The apportionment by mileage urged by Budget is not required under the commerce clause, especially where there is this volume of local activities. *See Capitol Greyhound Lines v. Brice,* 339 U. S. 542, 70 S. Ct. 806, 94 L. Ed. 1053 (1950). Finally, the tax is on the privilege to use the highways in this state, not on the use itself. Although Budget may charge by the *mile* driven, the tax is a flat percentage charge for the *privilege.*

Of course, as Budget readily admits, there is no question of double taxation herein as Ohio charges no registration tax or usage tax on any of the Ohio licensed vehicles in the fleet.

STATUTORY APPLICATION

We further affirm the Board of Tax Appeals in its opinion that the tax applies to *all* charges, including "total time and mileage," "full collision insurance," "personal accident insurance," and "drop-off charges," as set out in the lease agreement with Budget as lessor and the customer as lessee. We find no ambiguity in a statute which assesses the usage tax upon "gross rental" and "gross . . . lease charges." As any dictionary definition reads, "gross" means "without deductions." If it is a charge contained in the lease, by clear meaning that is a "lease charge."

We reverse the Court of Appeals on the issues herein disposed of and remand this case to the Franklin Circuit Court for further proceedings dealing with penalty assessment, statute of limitations, and all other issues originally raised but not disposed of in that court.

All concur.

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Supreme Court of the United States

OCTOBER TERM, 1985

BUDGET RENT-A-CAR
OF CINCINNATI, INC. ..... APPELLANT

VS.

REVENUE CABINET, COMMONWEALTH
OF KENTUCKY ..... APPELLEE

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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ARGUMENT

There are three questions involved here.

I. STATES' RIGHTS TO LICENSE AND TAX THE USE OF INTERSTATE HIGHWAYS SHOULD BE BROUGHT INTO THE SECOND HALF OF THE TWENTIETH CENTURY

The Commonwealth of Kentucky in its Motion to Dismiss or Affirm [herein Motion] characterizes this issue as involving the question whether Budget may "rent its Ohio-licensed vehicles from its Kentucky outlet without paying tax to Kentucky." [Motion, p. 2]. As has been its custom, the Commonwealth thus mischaracterizes this highway usage tax — as if it were a rental transaction tax. Apart from misstating the question, the Commonwealth's response is threefold:

First. The Commonwealth states that this issue was "not raised by Budget and [has] never been discussed in the proceedings below," and again that the issue was "not raised before." [Motion, pp. 2 and 5].

We find no provision in the Rules of this Court to enter into factual disputes. We can merely represent to the Court that the issue was in fact raised below. The following appeared in our brief to the Supreme Court of Kentucky:

> The general rule is that 'every motor vehicle is taxable.' The very special section – which gives a 'credit' only in the case of a reciprocal tax of another state — applies only in the specifically named conditions. *It does not apply to Ohio residents, whether they work in a factory, practice law, or lease vehicles to customers.* We do not know how many states are like Ohio. If the Revenue Cabinet is correct in its reading of the statute, all their citizens are subject to tax at the Ohio River bridges.
>
> Need we point out that such a construction of the statute would be blatantly unconstitutional? If there were a matter of double taxation, the problem could be solved by a 'credit.' But it is a matter of an obviously unreasonable burden on interstate travel and commerce. *Kane* v. *State of New Jersey,* 242 U.S. 160 (1916) does not validate an unreasonable tax. *Id* at 168. See *Massachusetts* v. *United States,* 435 U.S. 444 (1978) at 463. We presume that the Revenue Cabinet does not argue that a $500 tax on a vacation trip by the owner of a $10,000 car would be 'reasonable for the privilege granted.'

The Commonwealth of Kentucky said in its brief that it was an "historical aside" that this Court "once ruled that a state may require registration of all

vehicles — even those registered elsewhere," citing *Kane.*[1]

It is our respectful contention that the "historical aside" needs to be brought into the modern era.

Second. The Commonwealth suggests that Budget has no standing to question the "first alternative" tax, because it is not "one of those hypothetical non-residents who was stopped and forced to pay the tax." [Motion, p. 6] The facts, again, belie the Commonwealth's argument. Everyone in Budget's business, including Budget, is "stopped and forced" to "pay the tax" — or elect to pay an alternative tax. The "first alternative" tax is inextricably connected with the "second alternative" taxing scheme. Furthermore, this Court has recently held that the standing of a party to raise such a constitutional issue is not dependent upon so direct an application to the appellant. *Williams* v. *Vermont*, 105 S.Ct. 2465 (1985).

This Court is not likely soon to find another case where these intertwined Constitutional issues can be considered in a single opinion.

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[1]In the Commonwealth's very first brief to the Kentucky Board of Tax Appeals, it conceded the applicability of an old Kentucky case, now apparently overruled, which had held that Kentucky could not register and charge a fee to "non-residents temporarily operating in Kentucky." *Reeves* v. *Deisenroth*, 157 S.W.2d 331 (Ky. 1941). The Supreme Court of Kentucky (then the Court of Appeals) carved down a statute "by indirection," applying what it referred to as "the doctrine of comity between states." *Id* at 335.

Third. The Commonwealth argues that this issue "was decided purely under state law . . . since it involves only state law." [Motion, p. 2]. Mr. Justice Brandeis in *Kane* was declaring federal Constitutional law. If the Supreme Court of Kentucky truly misunderstood this, its error is established — and enormous.

II. THE DIRECT TAXATION BY A STATE OF THE USE OF ANOTHER STATE'S HIGHWAYS SHOULD BE PREVENTED, AND BRADY CLARIFIED.

One of the Commonwealth's contentions is that "this Court has ruled that a state may ignore mileage completely in evaluating the apportionment prong of the *Complete Auto Transit* [v. *Brady*] test." [Motion, p. 5]. To support the notion that the Court "has ruled" on "the apportionment prong" of the *Brady* test, the Commonwealth cites *Brice* — which was decided twenty-seven (27) years before *Brady*. This Court is thus granted a prescience which it surely does not claim. And *Brice* does not stand for the rule stated by the Comonwealth.

The Commonwealth also argues that "[s]ubsequent cases discussing *Complete Auto Transit* [v. *Brady*] have indicated that it applies to all types of interstate commerce, including use of highways." [Motion, p. 4]. The Commonwealth's problem is that the case of *Massachusetts* v. *United States*, 345 U.S.

444 (1978) cited *Brady* only for the "general" applicability of the Commerce Clause to enactions of states. *Id.* at 462. When this Court turned to the appropriate application of a "flat annual fee," it cited not *Brady* but *Brice* as an "analogous context." *Id.* at 463. *Massachusetts* v. *United States*, then, is worth noting as one occasion when this Court has suggested that highway usage cases are *not* to be treated under the *Brady* test. That suggestion should be the central focus of a full opinion in this case.

III. ELEMENTARY FAIRNESS REQUIRES THAT NO JUDICIAL DECISION BE BASED ON A COURT-CREATED "FACT."

The Commonwealth does not dispute the fact that the Supreme Court of Kentucky has invented a fact upon which it could base its decision. Nor does the Commonwealth dispute the applicability of the law we have cited.

The sole reply of the Commonwealth, then, is that as a Constitutional matter this issue was "not raised by Budget and [has] never been discussed in the proceedings below." [Motion, p. 2]

The Commonwealth's problem is that Budget's Constitutional rights were not violated until the Supreme Court of Kentucky created the new fact. We certainly pointed out to the Supreme Court of Kentucky that we had made no election to be treated under the Revenue Cabinet's version of the "second

alternative" tax. We represent that to this Court. But there was no way at that time we could have known that the Supreme Court of Kentucky would deny us due process of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief Opposing Motion to Dismiss or Affirm was served this 13th day of May, 1986, in compliance with Rules 16 and 28 of the Supreme Court of the United States, by depositing three copies of same in a United States post office or mailbox, with first-class postage prepaid, addressed to the following: Hon. Ross T. Carter, Legal Services Section, Revenue Cabinet, P.O. Box 423, Frankfort, Kentucky 40602 and Hon. David L. Armstrong, Attorney General, Office of the Attorney Genderal, 116 Capitol Building, Frankfort, Kentucky 40601. All parties required to be served have been served.

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